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Federal treaties and State laws," a subject which was discussed to some extent in the opening address of our President this morning.

The first paper will be by Prof. Charles Noble Gregory, dean of the College of Law, Iowa State University.

ADDRESS OF PROF. CHARLES NOBLE GREGORY,
OF THE IOWA STATE UNIVERSITY, IOWA CITY, IOWA.

Mr. Chairman and Gentlemen of the Society: The rights of foreigners in case of conflict between Federal treaties with their several countries and laws enacted by the States have been recently much considered.

Such questions are undoubtedly to be solved by constitutional law under our frame of government, but they so directly affect our international obligations and relations that they are habitually treated as proper topics to be discussed in our best works on international law.

Thus, Wheaton, our first great writer on this branch, treats extensively of treaties and the power to make and enforce them, not omitting our constitutional provisions.¹ The present accomplished Solicitor for the State Department, Dr. Scott, in his "Cases on International Law," includes many on the constitutional force and effect of treaties as the law of the land.² And Dr. Wharton, in his International Law Digest, devotes nine and one-half pages to the authority of treaties in the United States.³

The Digest of International Law published by the United States Government in 1906, edited with great judgment and learning by the Hon. John Bassett Moore, gives to the subject of treaties two hundred and thirty-two pages,⁴ besides still greater space given to conventional and diplomatic relations, and discusses at length the enforcement of treaties and "judicial action" therefor⁵ and the

¹ Wheaton's Inter. Law, § 538 *et seq.*, 4th ed., 1904. Same, edited with notes by R. H. Dana (1866), p. 714.

² Scott's Cases on Inter. Law, p. 412 *et seq.*

³ 2d ed., § 138.

⁴ Vol. V, p. 158 *et seq.*

⁵ Same, p. 233.

implied revocation or repeal of State constitutions and statutes by treaties.⁶

This topic may perhaps be considered like that large class of goods provisionally contraband which is of ambiguous use (*ancipitis usus*), leaving its character, like that of the goods, to be finally determined by its destination. On that theory this discussion is here plainly one of international law.

The Federal Constitution (by Article I, sec. 1) provides: "All legislative powers *herein granted* shall be vested in a Congress of the United States;" and there is incorporated in the article (of nine sections and many subdivisions) an elaborate and somewhat minute enumeration of the powers of Congress so confided.

The Congress therefore possesses only these enumerated powers and such as can be derived therefrom.

By subdivision 2, sec. 2, Article II, of the same instrument, among the powers conferred upon the President is found the following: "He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur." By subdivision 2, Article VI, "This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding."

Luther Martin, of Maryland, on Tuesday, July 17, 1787, moved in the Federal Convention, "That the legislative acts of the United States, made by virtue and in pursuance of the Articles of Union, and all treaties made and ratified under the authority of the United States, shall be the supreme law of the respective States, as far as these acts or treaties shall relate to the said States, or their citizens and inhabitants; and that the judiciaries of the several States shall be bound thereby in their decisions, anything in the respective laws of the individual States to the contrary notwithstanding," which was

⁶ Same, p. 371.

agreed to *nem. con.* (The Madison Papers, 5 Elliott's Debates, p. 322.)

This was included in the resolutions referred to the Committee of Detail, Thursday, July 26. (Same, p. 375.) On August 6 Mr. Rutlege delivered in the report of the Committee of Detail and the provision was then shaped to read as follows:

ART. VIII. The acts of the Legislature of the United States, made in pursuance of this Constitution and all treaties made under the authority of the United States, shall be the supreme law of the several States and of their citizens and inhabitants; and the judges in the several States shall be bound thereby in their decisions, anything in the constitutions or laws of the several States to the contrary notwithstanding.

August 15 Colonel Mason declared that the Senate "could already sell the whole country by means of treaties." Mr. Rutlege moved an amendment of this on August 22, which was agreed to *nem. con.*, but did not alter the language as to treaties. (Same, p. 467.) On August 25, on motion of Mr. Madison, seconded by Mr. Gouverneur Morris, the words "or which shall be made" were added *nem. con.* (Same, p. 478.) Considerable debate and difference of opinion appeared. A slight verbal amendment was offered by Mr. Rutlege August 27 and carried *nem. con.* (Same, p. 483.) The final draft received from the Committee on Style contained the language on this subject finally agreed to and adopted and which has stood in the Constitution ever since.

The vast extent of the treaty-making power was at once observed and was one of the grounds of opposition to the ratification of the Constitution in the Pennsylvania convention.⁷

In a debate in the legislature of South Carolina as to calling a State convention to ratify the Constitution, and in the State convention itself, the far-reaching effect of the treaty-making power was fully discerned and violently attacked, but notwithstanding this the Constitution was ratified by South Carolina.⁸

⁷ Butler's Treaty-Making Power, Vol. I, § 200 and notes.

⁸ Butler's Treaty-Making Power, Vol. I, §§ 207, 208, 209, 210, citing Elliott's Debates, Vol. IV, pp. 253 to 340.

In the Virginia convention the opposition was led by Patrick Henry, and he declared of treaties: "To make them paramount to the constitution and laws of the States is unprecedented." "Gentlemen are going on in a fatal career; but I hope they will stop before they concede this power unguarded and unaltered."⁹ This was on Wednesday, June 18, 1788. The Constitution was ratified by Virginia by a vote of 89 to 79, but though nearly one hundred and nineteen years have passed the prognostic of the great Virginian has not been verified and the "fatal career" has not yet terminated in fatality.

In the New York convention, Mr. Lansing proposed an amendment to the effect that "no treaty ought to alter the constitution of any State," but no action is recorded upon it, and New York ratified the Constitution.¹⁰

North Carolina rejected the Constitution, and quite largely on account of objection to the provision as to the making of treaties. It was urged that as they were "the supreme law of the land, the House of Representatives ought to have a vote in making them."¹¹

The full and paramount treaty-making power was defended in the *Federalist* and other contemporary Federalist publications over and over again, and attacked by opposing writers and pamphleteers as Richard Henry Lee and George Mason.¹² It was one of the burning questions involved in the ratification of the Constitution, and the scope of the provision was fully apprehended on every side.

It will be observed that the powers of Congress are those "granted" and that they are carefully specified; that there is a grant to the President and Senate of the treaty-making power with no specifications or limitations; that laws of the United States "made in pursuance" of such Constitution and all treaties made "under the authority of the United States" are "the supreme law of the land,"

⁹ Same, § 216, citing Elliott's Debates, Vol. III, p. 499.

¹⁰ Butler's Treaty-Making Power, Vol. I, § 226, citing Elliott's Debates, Vol. II, p. 287.

¹¹ Butler's Treaty-Making Power, Vol. I, § 228, citing Elliott's Debates, Vol. IV, p. 119.

¹² Butler's Treaty-Making Power, Vol. I, § 239 *et seq.*

with no express provision that the latter must be "pursuant" to the Constitution.

This might seem to give countenance to the theory that the treaty-making power is not restrained even by the Federal Constitution itself, but such a construction would have certainly been strained and the opposite conclusion seems to have been generally reached. Thus, Chancellor Kent quoted from Story's Commentaries the following conclusion: "The treaty-making power is necessarily and obviously subordinated to the fundamental laws and Constitution of the State, and it can not change the form of the government or annihilate its constitutional powers."¹³ Mr. Butler, in his very valuable work on "Treaty-Making Power of the United States,"¹⁴ quotes at length from Dr. Ernest Meier to the effect that the Constitution has confided certain matters to Congress (as naturalization, patents, copyright, control of the army, the declaration of war, borrowing money), and that these powers positively conferred on Congress can not be usurped by the treaty-making power.

It may be suggested that matters not granted by the Constitution were reserved by the States. This is beyond controversy, but the right to make treaties was granted; therefore it was surrendered by the States, and it was surrendered absolutely and utterly and in its entirety and granted to the Federal treaty-making power specified. This grant was not limited by any express provision of the grant, and was in terms made paramount to State constitutions or State laws. If any limitation can be found it lies in the function and nature of a treaty.

We seem, then, forced to the conclusion that the power to make any engagement or regulation of a character customarily deemed within the scope of a treaty, except as the Constitution expressly bestows the control of certain matters on Congress, the judiciary, or some other branch of government, is granted to the Federal treaty-making power; that such treaty is made by the Constitution paramount to any State constitution or statute and necessarily to any

¹³ Kent in Lecture XIII, pp. 236-7. Story's Commentaries on Constitution, II, § 1502. Both quoted Butler's Treaty-Making Power, § 309 and notes.

¹⁴ Butler's Treaty-Making Power of United States, Vol. I, p. 447.

ordinance or regulation of any of the subdivisions or agencies of the State.

It is believed that all the Federal decisions are consistent with and support this view, and that there are many State decisions concurring.

The very first important decision as to treaties, made by the United States Supreme Court in 1796, involved this very question of the conflict of a Federal treaty with a statute of one of the States. In *Ware v. Hilton*,¹⁵ it was held that under our treaty of peace with Great Britain a British creditor could recover a debt previously contracted to him by one of our citizens notwithstanding payment of the debt by the creditor into the treasury of Virginia during the war, pursuant to a statute of that State making such payment a discharge. The court held that Virginia had the power of confiscating the debt and that she exercised her lawful power (p. 235). It was doubted by one of the counsel (Mr. Marshall) whether Congress had a power to make a treaty that could operate to annul a legislative act of any of the States and to destroy rights acquired by or vested in "individuals in virtue of such acts." It was decided that the stipulation in the treaty that creditors "on either side shall meet with no lawful impediment to the recovery of the full value, in sterling money, of all *bona fide* debts heretofore contracted" rendered the Virginia law and all defenses thereunder void and ineffectual as against a debt covered by the treaty.

It is not to be overlooked that the power of Virginia to pass the act was fully conceded in the leading opinion by Chase, J., but it was as fully held that a State statute already passed in a matter unquestionably under the control of the State was invalidated if it conflicted with a Federal treaty, and action thereunder was wholly without effect. As Mr. Butler says:

The opinions in this case alone, had they never been cited and approved in subsequent decisions, would be sufficient to justify any commissioners concluding a treaty for the United States in making whatever absolute stipulations might in their opinion be necessary

and proper in order to gain any desired result, and in regard to any matters, whether exclusively within the control of the States or not; and clothe the Central Government with ample power to enter into and enforce all such treaty stipulations.¹⁶

As Justice Cushing said in the case above:

The treaty, then, as to the point in question, is of equal force with the Constitution itself, and certainly with any law whatsoever.¹⁷

This case was the only one in the Supreme Court on which John Marshall appeared as counsel, and he was unsuccessful,¹⁸ though Patrick Henry was associated with him.¹⁹ Patrick Henry, who had opposed the ratification of the Constitution by Virginia, as we have seen, here exerted himself to the utmost to prevent its overriding the Virginia statute. He is said to have shut himself up for three days in his office while preparing himself, without seeing even a member of his family, his food being handed in to him by a servant. His argument lasted three days and "so injured his voice that it never fully recovered its strength." The doctrine of this case has stood unquestioned ever since, for over one hundred years, and has been constantly cited, approved, and followed.²⁰

In 1806, in *Hopkirk v. Bell*,²¹ it was held that a debt due a British subject prior to the war of the Revolution could not be barred by the statute of limitations of Virginia contrary to the treaty of peace of 1783.

In *Fairfax's Devisee v. Hunter's Lessee*²² (1813), the question was whether Lord Fairfax, at his death, having the absolute property

¹⁶ Treaty-Making Power of the United States, Vol. II, p. 7.

¹⁷ 3 Dallas, p. 284.

¹⁸ Treaty-Making Power of the United States, Vol. II, p. 10.

¹⁹ See Macgruder's *American Statesmen*, John Marshall, p. 38. My attention has been kindly called to this by Mr. J. J. Lamb. Patrick Henry does not appear as counsel in this case in the report, but his participation is also mentioned by Mr. Carson in his *History of the Supreme Court*, p. 169. See *Butler's Treaty-Making Power*, § 330, note 1.

²⁰ Treaty-Making Power of the United States, Vol. II, p. 11.

²¹ 3 Cranch, 454.

²² 7 Cranch, 603.

in the waste and unappropriated lands in the northern neck of Virginia, could devise them to Denny Fairfax, his nephew, an alien enemy, and whether the Commonwealth of Virginia could grant them so as to defeat the latter's title. It was held it could not and that the treaty of 1794 confirmed the title in the devisee. It is held that though the State had once a right by inquest of office found to divest the alien's title, yet "it has not so done and its own inchoate title (and of course the derivative title, if any, of its grantee) has by the operation of the treaty become ineffectual and void."

The Court of Appeals of Virginia denied the jurisdiction of the Supreme Court of the United States and the constitutionality of the provisions of the Federal judiciary act under which the decision of the State court was reversed, and the Federal Supreme Court on writ of error reversed the judgment of the Virginia court, the opinion of the court being delivered with great learning and elaboration by Justice Storey.²³

Thus, a most determined and repeated attempt by perhaps the chief State of the Union (at that time) to establish the independence of its laws as to realty from the control of Federal treaties met with complete defeat and the doctrine with final repudiation.

In 1817 the case of *Chirac v. Chirac*,²⁴ was decided by the Federal Supreme Court, Chief Justice Marshall writing the opinion, and it held that where a naturalized Frenchman died intestate, leaving lands in Maryland, his heirs being French citizens, these heirs could recover the lands notwithstanding the attempt of the State to escheat them under its anti-alien laws, since our treaty with France enabled subjects of France to hold lands in the United States.

The case of *Orr v. Hodgson* (1819), *supra*,²⁵ held that the treaty of 1793 protected from forfeiture by reason of alienage lands then held by British subjects, but that lands could not be inherited or transmitted by a person once a British subject but who had become a Venetian subject and lost British citizenship, since such person

²³ *Martin, Heir and Devisee of Fairfax, v. Hunter's Lessee*, 1 Wheat., 304 (1816). *Smith v. Md.*, 6 Cranch, 286.

²⁴ 2 Wheat., 259.

²⁵ 4 Wheat., 453.

suffered all the disabilities of alienage and was not within the terms of the treaty which affected British and American citizens only.

Shortly after, in a group of cases, the various Federal courts declared that State laws providing for the confiscation of property owned by a British society were ineffectual in so far as they conflicted with our Federal treaty with Great Britain, and these cases held that the rights²⁶ of parties under these treaties were so vested that the war of 1812 did not divest them and that a State could not pass laws confiscating franchises.

The case in 8 Wheaton was argued by Mr. Webster in support of the State confiscation and was decided in 1823, *Washington, J.*, giving the opinion of the court, but not even Mr. Webster's great powers or the deep feeling hostile to all British interests or claims, resulting from the recent war of 1812, could induce the court to in the least modify its previous views, and the protection of the treaty against acts of confiscation was extended to a British corporation exactly as to a natural British subject.

It was held that this property was "protected against forfeiture for the cause of alienage, or otherwise, by the treaty of peace. This question as to real estates belonging to British subjects was finally settled in this court in the case of *Orr v. Hodgson*, 4 W. 453, in which it was decided that the sixth article of the treaty protected the titles of such persons to lands in the United States which would have been liable to forfeiture, by escheat, for the cause of alienage or to confiscation *jure belli*," and the court declared "we can discover no sound reason why a corporation existing in England may not as well hold real property in the United States as ordinary trustees for charitable or other purposes, or as natural persons for their own use."

In 1824, in *Hughes v. Edwards*,²⁷ the court held that a British subject, being an alien, could foreclose a mortgage on land in Ken-

²⁶ *Society for the Propagation of the Gospel v. Hartland*, 2 Paine, 536; *Same v. Wheeler*, 2 Matthews, 105; *State of Vermont v. Soc. for Prop. of the Gospel*, Fed. Cases, 16, 19, 20; *Soc., etc., v. Town of New Haven*, 8 Wheat., 464; *Treaty-Making Power of the United States*, Vol. II, p. 12.

²⁷ 9 Wheaton, 489.

tucky, since it did not involve any recovery of the possession of the land, but Washington, J., intimated that British subjects under the protection of the treaty could bring suit even for the recovery of the land itself.

In 1840, in *Pollard's Lessee v. Kebbe*,²⁸ Mr. Justice Baldwin declared "all treaties, compacts, and articles of agreement in the nature of treaties to which the United States are parties have ever been held to be the supreme law of the land, executing themselves by their own fiat, having the same effect as an act of Congress and of equal force with the Constitution."

In 1866 the Supreme Court of the United States held, in the case of "*The Kansas Indians*,"²⁹ that the State could not tax their lands held in severalty contrary to a provision of the treaty made by the United States with the Indian tribes exempting their lands "from levy, sale, and forfeiture," that being construed to extend to forfeiture for nonpayment of taxes.

This was fully adopted and approved in cases of an attempt to tax lands of the Seneca Indians by the State of New York. They were held fully protected by a treaty with the United States assuring them of such lands "without disturbance by the United States."³⁰

In 1879 the Federal Supreme Court, in *Hauenstein v. Lynham*,³¹ considered the power of Virginia under her statutes to cause lands within her borders acquired by a citizen of Switzerland to escheat on his death, his heirs being aliens.

It holds that under our treaty with Switzerland of 1850 a Swiss citizen was given the right, if successor to any real estate within the United States which as an alien he could not hold, to sell the same and withdraw the proceeds without other charge than that exacted from natives; that "a treaty can not be *the supreme law* of the land — that is, of all the United States — if any act of a State legislature can stand in its way. If the constitution of a State (which is the fundamental law of the State and paramount to its legislature)

²⁸ 14 Peters, 353.

²⁹ 5 Wallace, 737.

³⁰ *The New York Indians*, 5 Wallace, 761 (1866).

³¹ 100 U. S., 483.

must give way to a treaty and fall before it, can it be questioned whether the less power, an act of the State legislature, must be prostrate?" That the treaty is within the treaty-making power conferred by the Constitution.

The judgment of the Court of Appeals of Virginia was reversed and it was held the escheator could have no claim as such.

In 1889 the Supreme Court of the United States again considered the treaty-making power in its relation to State laws, in *Geoffroy v. Riggs*,³² where Mr. Justice Field spoke for the court. It was held that the treaty of 1800 with France suspended the common law and statutes of Maryland so far as they prevented French citizens from taking real or personal property by inheritance or succession from persons in the United States.

The opinion declares: "That the treaty power of the United States extends to all proper subjects of negotiation between our Government and the governments of other nations is clear. It is also clear that the protection which should be afforded to the citizens of one country owning property in another and the manner in which that property may be transferred, devised, or inherited are fitting subjects for such negotiation and of regulation by mutual stipulations between the two countries;" and again: "The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the Government or its Departments, and those arising from the nature of the Government itself and of that of the States."

When Chinese immigration was thought by the inhabitants to have become a menace to the Pacific States they, by a series of acts, tried to discourage it.

Our treaty with China contained reciprocal provisions for rights of immigration, travel, and daily pursuit of business and labor of Americans in China and Chinese citizens in our country,³³ and in the later seventies the controversy shifts largely to the Pacific coast and involves the rights of Mongolians.

Oregon by statute forbade the employment of Chinese laborers on

³² 133 U. S., 258.

³³ *Butler's Treaty-Making Power*, § 336.

public works, and under the statute there was an attempt to enjoin a contractor from employing Chinese labor.

Judge Deady, of the United States District Court, held that if the State could exclude from this form of labor it could exclude from all; that the treaty furnished the law and was supreme and necessarily implied "the right to live and labor for a living." A demurrer to the bill on other grounds was sustained, and this was affirmed on rehearing by Mr. Justice Field and Deady, District Judge, August 21, 1879.³⁴

In 1879 California by her constitution prohibited corporations from employing Chinese labor, and authorized appropriate statutes which were passed making such employment a crime. One Parrott was arrested for violation of the statute, but was released by the United States court on habeas corpus in 1880 on the ground that the provision of the State constitution and statutes thereunder conflicted with our treaty of 1868 with China and were therefore void.³⁵

In the same year a State statute prohibiting aliens incapable of naturalization from fishing was held void as contravening the terms of our treaty with China in that it discriminated against the Chinese and was favorable to other aliens.³⁶

In 1879 the validity of an ordinance of the city of San Francisco providing for the clipping of the hair, to a uniform length of one inch, of all persons imprisoned in the county jail under a criminal judgment was considered by the United States Circuit Court, Justice Field presiding, in what is known as the famous Queue Case. The ordinance was held invalid under the Fourteenth Amendment as aimed at a particular class and denying them equal protection under the law. Justice Field held that the Federal "Government alone can determine what aliens shall be permitted to land within the United States and upon what conditions they shall be permitted to remain." He points out that any restrictions needed must be imposed by the Federal Government, and that nothing can be accom-

³⁴ *Baker v. City of Portland*, 5 Sawyer, 566; Federal Cases, 777.

³⁵ *In re Tiburcio Parrott*, 6 Sawyer, 349.

³⁶ *In re Ah Chong*, 6 Sawyer, 451.

plished by "hostile and spiteful legislation on the part of the State, or its municipal bodies, like the ordinance in question" — legislation which is unworthy of a brave and manly people. Against such legislation it will always be the duty of the judiciary to declare and enforce the paramount law of the nation.³⁷

This was not a case involving a treaty, but does involve the conflict of a San Francisco ordinance with paramount Federal law.

The action was by a Chinese citizen to recover damages from the sheriff who enforced the unlawful ordinance, and judgment for the plaintiff was ordered on demurrer to pleas of justification under the ordinance.

In re Quong Woo ³⁸ (1882), the United States Circuit Court for California, Field, J., giving the opinion, held that "under the treaty with China a Chinese resident of this country is entitled to all the rights, privileges, and immunities of subjects of the most-favored nations with which this country has treaty relations; and where he was a resident here before the passage of the act of Congress restricting immigration of Chinese he has a right to remain and follow any of the lawful ordinary trades and pursuits of life, and his liberty so to do can not be restrained by invalid legislation," and the petitioner held for breach of such ordinance was discharged apparently on habeas corpus. The legislation referred to was an ordinance of San Francisco as to the laundry business, which ordinance was held void on other grounds.

In 1894 the United States Circuit Court for Wyoming was called on to decide whether the right of a Bannock Indian named Race Horse to hunt on unoccupied lands, given by a treaty between his tribe and the United States, could be affected by the game laws of Wyoming. It was held the passage of such laws was a matter entirely within the powers of the State, "but that these powers are subject to the right of the General Government to exercise the powers conferred upon it by the Constitution is perfectly clear."³⁹

Race Horse was accordingly ordered discharged on habeas corpus

³⁷ *Ho Ah Kow v. Nunan*, 5 Sawyer, 552.

³⁸ 13 Fed. R., 229.

³⁹ *In re Race Horse*, 70 Fed. R., 598.

from the custody of the sheriff, who held him on default of his bail under a charge of unlawfully killing seven elk in the State of Wyoming. The court holds that the preservation of game and fish has always been treated as within the proper domain of the police power of the State, and that the Supreme Court so held (*Lawton v. Steele*, 152 U. S. 133) that the State had the undoubted right to pass the law in question, but that "these powers are subject to the right of the General Government to exercise the power conferred upon it by the Constitution is perfectly clear."

The decision was reversed by the Supreme Court on other grounds, but without discrediting the decision as to the points above considered.⁴⁰

Yet the supremacy of the State in legislation in general as to crime has been repeatedly affirmed by the Federal Supreme Court, as in *Spies v. Illinois*,⁴¹ the Chicago Anarchists Case, and in *Brooks v. Missouri*,⁴² and as was also held in affirming the validity of electrocution as a punishment, *In re Kemmler*.⁴³

In *People ex rel. Cutler v. Dibble*,⁴⁴ an act for the summary removal of white intruders from Indian lands was held valid as a police regulation merely, the right of the one removed to litigate his title not being affected, but though the case is often cited as if it held that courts were loth to allow a treaty to deprive the State of its police power,⁴⁵ it is submitted that it does not so hold or intimate, but on the contrary deals with the rights of white men, who were not Indians and not aliens claiming any right under a treaty.

The case was carried to the Supreme Court of the United States and affirmed,⁴⁶ but Greer, J., for the court pointed out (p. 370-371) that the relators could not claim the protection of the treaty, and had no right of entry under the treaty, and therefore that this statute is "not in conflict with the treaty in question."

⁴⁰ *Ward v. Race Horse*, 163 U. S., 504; and see dissent by Mr. Justice Brown.

⁴¹ 123 U. S., 131.

⁴² 124 U. S., 394; and see *In re Shibuya Jugiro*, 140 U. S., 291.

⁴³ 136 U. S., 436.

⁴⁴ 16 N. Y., 203.

⁴⁵ *Butler's Treaty-Making Power*, § 356.

⁴⁶ 21 Howard, 366.

The right of a State to maintain a quarantine under its reserve police powers was upheld by the Supreme Court of Louisiana in 1899, when it was claimed to contravene a treaty with France.⁴⁷

The same question was raised in 1902 in the United States Supreme Court in *Compagnie Française v. State Board of Health of Louisiana*.⁴⁸ The majority of the court construed the treaty in question so that it was decided there was no conflict, but Justice Brown, dissenting, construed the treaty as conflicting with the State law and concludes: "Necessary as efficient quarantine laws are, I know of no authority in the States to enact such as are in conflict with our treaties with foreign nations." Justice Harlan joined in the dissent.

The California cases on the subject are by no means in agreement. *People v. Naglee*⁴⁹ upholds a requirement of a license fee of \$20 a month from foreign miners working gold mines, and decides that it does not conflict with any treaty, holding that the States have retained all power of taxation not surrendered to the Federal Government. No treaty or nationality was set out as giving any rights violated (see page 245), but it holds if a treaty conflicts with the reserved powers of the State it fails. But in *People v. Gorke*,⁵⁰ the same court five years later upheld a treaty right to inherit, notwithstanding the California laws, though the State's Attorney-General denied the authority of the Government to make such a provision by treaty.

The court says, page 385:

One of the arguments at the bar against the extent of this power of treaty is that it permits the Federal Government to control the

⁴⁷ *Compagnie Française v. State Board of Health*, 51 La. Ann., 645.

⁴⁸ 22 Sup. Ct. R., 811.

⁴⁹ 1 Cal., 232 (1850).

⁵⁰ 5 Cal., 381 (1855). Some extracts from this case are printed on page 7 of the brief of William G. Burke, Esq., City Attorney, and attorney for the respondents in the case of Keikichi Aoki, by Michitusgu Aoki, his guardian *ad litem*, v. M. A. Deane, Principal of Redding Primary School, in the city and county of San Francisco, involving the school rights of Japanese children lately pending in the Supreme Court of California, which the writer has had the privilege of examining.

internal policy of the State, and, in the present case, to alter materially the statute of distribution. If this was so to the full extent claimed it might be sufficient answer to say that it is one of the results of the compact, and if the grant be considered too improvident for the State, the evil can be remedied by the constitution-making power.

Finally, in 1900, the same court overruled all earlier aberrations and held in *Blythe v. Hinckley*,⁵¹ in harmony with the universal rule, that (syllabus) "the question as to the rights of aliens to possess, enjoy, and inherit property in the United States is a proper subject-matter of treaty, and a treaty regulating those rights must control all State legislation contrary thereto as the supreme law," and this though the court recognizes that a State has the primary right to regulate the tenure of all real property within its limits.

Innumerable other State decisions hold like doctrine.⁵²

Mr. Butler, in closing his chapter on "Treaties and State Laws," says: "In none of the cases reviewed in this chapter has the treaty-making power of the United States in any way been attacked or affected; the power exists; the treaties have always been declared valid" (sec. 359); and he points out that "the supremacy of treaties over State statutes conflicting therewith has not only been upheld by the Federal courts, but has been universally recognized by the State courts." Mr. Butler's work was published in 1902.

A careful examination of the American Digest, beginning with 1901 and coming down to the last advance sheets, shows no modification of the law as reported by Mr. Butler, but that the supremacy of treaties over State laws has been continuously and consistently maintained; it having been held in at least two cases within those years that Federal treaties could remove the disability of aliens to inherit imposed by State laws,⁵³ and in three cases that treaties

⁵¹ 127 Cal., 431.

⁵² *Jackson v. Wright*, 4 Johnson Cases, 75 (1809); *Kull v. Kull*, 37 Hun., 476; *Adams v. Akerland*, 168 Ill., 632; *Schultze v. Schultze*, 144 Ill., 290; *Opel v. Shoup*, 100 Ia., 407; *Doeherd v. Hilmer*, 102 Ia., 169; *Meier v. Lee*, 106 Ia., 303; *Cornet v. Winton's Lessee*, 2 Yerger, 143; *Maiden v. Ingersoll*, 6 Mich. 373.

⁵³ *Bahnand v. Bize*, 105 Fed. 485 (1901); *Doe v. Roe*, 55 Atl., 341 (Del., 1903).

regulating the administration of estates of aliens contrary to State law must prevail.⁵⁴

The prevailing doctrine is believed to be in full accord with *Railroad Co. v. Husen*,⁵⁵ where the rule was laid down broadly that "whatever may be the nature and reach of the police power of a State, it can not be exercised over a subject confided exclusively to Congress by the Federal Constitution. It can not invade the domain of the National Government;" and accordingly a statute of Missouri forbidding the passing of certain cattle through the State was held void.

As Marshall declared, in *Owings v. Norwood's Lessee*,⁵⁶ "whenever a right grows out of or is protected by a treaty it is sanctioned against all the law and judicial decisions of the States; and whoever may have this right is to be protected."

The suggestion that a matter never confided to the Federal Government by the Constitution is reserved to the State, and so beyond the control of a Federal treaty, would, if followed, reverse the decision of almost every case cited. The descent or devise of lands is a matter never surrendered and exclusively for State cognizance (except as to taxation), as was held by the United States Supreme Court in *Clark v. Clark*⁵⁷ and *Blythe v. Hinckley*.⁵⁸ But, as has been seen, treaties may to any extent modify this control. The same is true of distribution or bequest of personalty, enforcement of contracts, and of regulations as to game, yet treaties have been held paramount as to all of these.

We seem to have negotiated some twenty-two treaties for the arrest of deserters from ships, and a statute authorizing proceedings in a Federal court for the arrest and return of deserters under such a treaty is considered and upheld in *Tucker v. Alexandroff*.⁵⁹

⁵⁴ *In re Fattostini's Est.*, 67 N. Y. S., 1119; *In re Lobrasciana's Est.*, 77 N. Y. S., 1040; *In re Wyman*, 77 N. E., 379.

⁵⁵ 95 U. S., 465 (1877).

⁵⁶ 5 Cranch, 344 (1809).

⁵⁷ 20 Sup. Ct. R., 873.

⁵⁸ 21 Sup. Ct. R., 390.

⁵⁹ 22 Sup. Ct. R., 195 (1902).

Some fifteen treaties as to estates of deceased persons and some thirty as to property rights,⁶⁰ and as we have seen these have been repeatedly held valid and superior to State laws enacted within the admitted competence of the State.

The argument that legislative or executive or judicial powers in general not delegated to the Federal Government are fully reserved to the States is perfectly cogent and logical. It is beyond dispute or discussion. Every State has its departments of government appropriate to the exercise of these reserved powers.

No State has any department, or can have any, which can possibly exercise any treaty-making power, and the exercise of any such power is expressly forbidden to every State by section 10, Article I, Constitution of the United States. "No State shall enter into any treaty, alliance, or confederation."

The sole and only treaty-making power is in the President, with the advice and consent of the Senate.

It is as complete as that of any sovereign government, and is bestowed without reservation or limitation.

If the United States, having suffered a disastrous defeat (which has never happened, and it is our ardent hope may never occur), should be compelled to accede to a treaty which bound the State of New York to pay ten millions of dollars to the conquerer, or to cede a canal zone to Great Britain from the lakes to the seaboard, or which made His Imperial Majesty the Emperor of Japan *ex-officio* governor of California, or His Majesty the King of Great Britain *ex-officio* mayor of Boston, it is impossible to say that any express Federal Constitutional provision would be violated, and as the treaty prevails, any State statute or constitution to the contrary notwithstanding, it seems difficult to impeach the full force and validity even of such extreme concessions. If there could be a full and absolute cession of the territory and dominion of a State, there certainly might be a partial cession of territory or a special servitude imposed. If I can convey the fee I can grant an easement. Mr. Butler's Treaty-Making Power,⁶¹ dealing with the question of rights of ces-

⁶⁰ See index Treaties in Force, 1904.

⁶¹ Vol. 2, pp. 192-193.

sion, shows many cases of such cession in boundary settlements with Spain and Great Britain.

Since the treaty-making power of the States is absolutely and wholly eradicated by the Constitution; since the treaty-making power is wholly, absolutely, and without any express limitation delegated to the appointed Federal authority, which is given express power to override any State law or constitution; since treaties made pursuant to such power were expressly made paramount to any State constitution or statute, it seems impossible to find any limit to the dominion of treaties over State laws, except the discretion of the Constitutional treaty-making power. Our highest Federal Court has so far found no other limitation, although there are various expressions intimating that one exists in the nature of a treaty and the form of our Government.

The control of their own boundaries has often been claimed for the States of this Union, and that such boundaries could not be affected by the treaty-making power.

We have negotiated some six treaties with Great Britain concerning boundaries, besides three as to the Alaskan boundaries; some fourteen treaties or extensions thereof as to boundaries with Mexico, one with Russia, and at least one with Spain, and made an arrangement with Texas.⁶²

However, though there are some dicta and some departmental actions favoring the right of any State to be consulted before its boundaries are dealt with, and that may be the wise and considerate course, yet it is believed the only direct decision by our court of last resort is favorable to the absolute control of the boundaries of a State by our treaty-making power and that any grant of the State in disregard of such treaty is void. This decision was given in the case of *Lessee of Latimer v. Poteet*,⁶³ where the court considered the settlement of the boundary between North Carolina and the Cherokees by a treaty made by the United States with the latter, and decided that such treaty settled the boundary and that grants by

⁶² See title "Boundaries," in index to "Treaties in Force in 1904."

⁶³ 14 Peters, 4 (1840).

the State of land in the territory accorded to the Indians by the treaty were void.

Justice McLean for the court (page 13) says:

It is a sound principle of national law and applies to the treaty-making power of this Government, whether exercised with a foreign nation or an Indian tribe, that all questions of disputed boundaries may be settled by the parties to the treaty. And to the exercise of these high functions by the Government, within its constitutional powers, neither the rights of the State, nor those of an individual can be interposed.⁶⁴

As to the method by which an alien's right under a treaty is protected or redress is got for its breach, of course he may, as in case of any failure of duty owed him by this Government, complain to his own government and it may make diplomatic representations and often get for him or his representatives relief or compensation. As an example, that was the ultimate procedure between this country and Italy as to citizens of Italy who were put to death by a mob at New Orleans in 1891.⁶⁵ The Federal Government made compensation for the negligence of the local authorities.

The right of the alien under the treaty may be set up in any suit or proceeding by him or against him, and the court, State or Federal, is bound to give it full force and effect as paramount law. If this is refused, he may carry the case, if in the State courts, to the highest State court and then on writ of error, if his right is denied, carry it, as involving a Federal question, to the Supreme Court of the United States. This was the practice in the early case of *Fairfax's Devisee v. Hunter's Lessee*, decided in 1813, and in the same case in 1816 *Martin, Heir and Devisee of Fairfax, v. Hunter's Lessee*.⁶⁶ the judgment of the Court of Appeals of Virginia was reversed a second time and the judgment of the district court held at Winchester affirmed.

⁶⁴ Cited by Mr. A. K. Kuhn, *Columbian Law Review*, March, 1907, p. 179.

⁶⁵ *Scott's Cases International Law*, p. 328, note. *Moore's International Law Dig.*, Vol. VI, p. 837. And see the same vol., pp. 605 to 1037, title "Claims," for full review of many like cases.

⁶⁶ 1 Wheaton, 304.

That practice has been, it is believed, constantly followed, up to this time, and it seems adequate in civil matters.⁶⁷

It is not, however, the sole means of relief or redress for an alien denied his treaty rights.

If he is arrested under a State statute conflicting with a treaty, he may sue out a writ of habeas corpus in a Federal court, and if such conflict appear the Federal court will declare the State statute to that extent void, the restraint unlawful, and discharge the alien from custody.

That such relief by habeas corpus will be granted in case of imprisonment under a State law contrary to treaty provisions has been repeatedly decided, especially upon the Pacific coast.

As *In re Tiburcio Parrott*,⁶⁸ where an anti-Chinese employment provision in the constitution of California was held void.⁶⁹

And in 1904, in *Petit v. Wakelee*,⁷⁰ the Supreme Court of the United States held that a direct review by it was allowed where the construction of an extradition treaty was drawn in question on habeas corpus in the United States Circuit Court.

If the alien is subjected to any injury whatever under a State law or local ordinance conflicting with his treaty rights he may sue the person who inflicts injury and the State law or ordinance will be no justification. So held in *Ho Ah Kow v. Nunan*.⁷¹ Justice Field there held a Chinese alien deprived of his queue under an ordinance of San Francisco void as in conflict with paramount Federal law could recover damages, against the officer executing the void ordinance, by action in the Federal court.

The alien plaintiff claiming under a treaty may assert his rights by a proper action in the courts and they will be maintained by them in disregard of any inconsistent rights created by a State statute. So he may maintain ejectment for lands wrongfully taken under such

⁶⁷ *Clarke v. Harwood*, 3 Dallas, 342; *Shanks v. Dupont*, 3 Peters, 242 (1830); *Chy Lung v. Freeman*, 92 U. S., 275 (1875); *Hauenstein v. Lynham*, 100 U. S., 483 (1879).

⁶⁸ 6 Sawyer, 349.

⁶⁹ See *In re Quong Woo*, 13 Fed., 229.

⁷⁰ 24 Sup. Ct. R., 657.

⁷¹ 5 Sawyer, 552; 12 Fed. Cases, Case No. 6546.

State law.⁷² Or in an action to foreclose a mortgage or enforce a debt may defeat any State statute of confiscation or limitations.⁷³

The holder of lands under a State law may be decreed in equity to convey them to one whose prior claim to them is protected by treaty.⁷⁴ Or equity may decree the sale of an interest in lands at the suit of alien heirs entitled by treaty to inherit the same, any local law to the contrary notwithstanding, and may further decree the payment of the proceeds to such aliens.⁷⁵

Anyone injured, it seems, might in equity enjoin the enforcement of a State law conflicting with a treaty if he could show such facts as otherwise entitle equity to take jurisdiction.⁷⁶

If an arrest is made by an officer in breach of treaty rights the alien so arrested may maintain tort for false imprisonment, as was held in *Tellefsen v. Fee*.⁷⁷

This case holds that our treaty with Sweden and Norway deprives the courts of this country of jurisdiction of an action by a seaman for wages against the master of a Norwegian vessel, and that an arrest on the deck of the vessel as she lay at a Boston wharf under certificate from a master in chancery was an unlawful assault after the defendant had informed the constable that the ship was a Norwegian one, that he was her captain, and that the claim would be adjusted at the consulate of Sweden and Norway. It is held that plaintiff was entitled to an instruction that the process did not justify the arrest and that plaintiff was exempt from arrest thereunder, and the court collects decisions to the point that such treaties have almost uniformly been held to take away all right of action for wages in the courts of this country, whether action is in rem or in personam, citing six prior decisions to like effect.⁷⁸

⁷² *Society for Prop. of the Gospel v. New Haven*, 8 Wheat., 464; *Carver v. Jackson*, 4 Peters, 1 (1830); *Chirac v. Chirac*, 2 Wheat., 259 (1817).

⁷³ *Hopkirk v. Bell*, 3 Cranch, 454; *Higginson v. Mein*, 4 Cranch, 415; *Hughes v. Edwards*, 9 Wheat., 489 (1824).

⁷⁴ *Craig v. Bradford*, 3 Wheaton, 594 (1818).

⁷⁵ *Geoffroy v. Riggs*, 133 U. S., 258 (1889).

⁷⁶ *Baker v. Portland*, 5 Sawyer, 566; 2 Fed. Cases, Case No. 777.

⁷⁷ 168 Mass. 188 (1897).

⁷⁸ *Norberg v. Hillgren*, 5 N. Y. Legal Obs., 177; *The Elwine Kreplin*, 9 Blatch.

Our laws seem defective only in failing to provide by Federal statute that the violation of treaty rights shall be a crime to be prosecuted by the United States Government in the United States courts.⁷⁹ Our Federal courts have no common-law jurisdiction in criminal matters, but exactly as a Federal statute provides a procedure which is upheld for enforcing treaty rights as to runaway foreign sailors,⁸⁰ so it might provide for direct enforcement of other treaty rights or for punishment in case of their breach.

Since the treaty is a part of the Federal law it becomes the duty of the Chief Executive to enforce it, and no reason is apparent why, by the law officers of the Government, it may not be enforced through the courts.

Judge Simeon Baldwin, of the Supreme Court of Connecticut, has lately expressed in print his belief that the Government might move for a mandatory injunction in its own name for this purpose or countenance and support the suit of an individual, or if the construction of a treaty is involved take steps to refer it to the Hague Tribunal.⁸¹

The Supreme Court *In re Debs*⁸² intimated that while it might be competent for the Federal Government to remove obstructions to the operations of its laws as to the mail and interstate commerce by direct force, yet the jurisdiction of the courts to intervene by injunction at the suit of the Government was ancient and fully recognized. It would require but a small extension if any to apply a like remedy to the obstruction under State authority of the treaty rights of aliens. If that were so the proceeding by contempt, not against the State, but against any persons claiming to act under State laws in derogation of treaty rights, which so-called State laws are not State laws but as to such treaty rights merely void enactments, would seem to be efficient and adequate for most purposes to enforce obedience to paramount law.

C. C., 438; *The Salamoni*, 29 Fed. R., 534; *The Burchard*, 42 Fed. R., 608; *The Marie*, 49 Fed. R., 286; *The Welhaven*, 55 Fed. R., 80.

⁷⁹ See note *Scott's Cases International Law*, p. 328.

⁸⁰ *Tucker v. Alexandroff*, 22 Sup. Ct. R., 195.

⁸¹ *Columbia Law Review*, February, 1907, p. 92.

⁸² 158 U. S., 564; 15 S. Ct. R., 900 and 1039.

The CHAIRMAN. I will call the attention of the members of the Society to the fact that at the close of the papers, if there is time, as I think there will be, the subject will be open to discussion, in five-minute speeches.

The next paper will be by Prof. Theodore P. Ion, of the Boston University Law School.

ADDRESS OF PROF. THEODORE P. ION,¹

BOSTON UNIVERSITY LAW SCHOOL, BOSTON, MASS.

Mr. Chairman and Members of the Society: The paper which I am about to read is an answer to the very able statement that was made this morning by the distinguished President of this Society.

The act of the Board of Education of San Francisco in assigning to Japanese pupils separate school buildings has been the occasion of a diplomatic incident which, although insignificant in itself, may lead to far-reaching consequences both in regard to the internal affairs and the external relations of the country.

It is neither the first nor will it probably be the last sign of the struggle for equality of the yellow with the white man, which may subsequently be emphasized in a more tangible if not abrupt manner, resulting in a clash between the two races—the one trying to insure the equality, the other striving to maintain the supremacy.

Leaving to the future the evolution of that struggle, let us now examine the present incident, not from the ethical or the point of view of natural justice, but purely from the legal aspect, and see as to how far the Japanese grievances are well founded, justifying a diplomatic intervention in the internal administration of the Republic.

Two principles are here involved: the one is of international, the other of constitutional law.

The first is connected with the external affairs of the country;

¹ It is not the policy of the Society to republish an article which has appeared elsewhere, but for the sake of completeness the fact has been overlooked that Mr. Ion's paper had previously appeared in the *Michigan Law Review*, Vol. V. page 326.

the second with its internal or constitutional structure. The former affects the Federal Government in its foreign, the latter in its home, policy. It certainly requires not a little wisdom to harmonize both, and to avoid the conflict which might inevitably, at times, result from such a division of authority.

Leaving aside the question of the responsibility of the Federal Government toward foreign powers, in all matters connected with grievances against any State of the Union, which is not at issue in the present case, at least for the moment, let us now see as to how far the treaty rights of Japan have been violated through the action of the Board of Education of San Francisco, or rather in consequence of the statute of the legislature of California ordaining separate schools for pupils of Mongolian descent.

According to article 1 of the treaty of 1894 "the citizens or subjects of each of the Contracting Parties shall have full liberty to enter, travel, or reside in any part of the territories of the other Contracting Party," * * * and "in whatever relates to rights of residence and travel * * * the citizens or subjects of each Contracting Party shall enjoy in the territories of the other the same privileges, liberties and rights, and shall be subject to no higher imposts or charges in these respects than native citizens or subjects of the most favored nation."

Conceding that the clause of the most-favored nation is of general character and not simply limited to the "charges and imposts," and that, consequently, the subjects of Japan are entitled to enjoy in the United States the same privileges and rights as the citizens of the United States or the foreign subjects, let us now see what are the rights and privileges enjoyed by other aliens residing in this country and generally in territories of foreign nations. That these "rights and privileges" can not include "political rights" everybody will concede; but do they include all "civil rights?" Is an alien, by virtue of the right of residence in a foreign country with all the rights and privileges appertaining thereto, entitled to the enjoyment of the right of holding real property, of that of patent and copyright, and numerous others which are only inherent to the right of citizenship?

As an eminent writer well observes, "foreigners are not submitted to all the charges imposed upon citizens; therefore they can not participate in all the advantages enjoyed by the latter; each state determines the rights which may be enjoyed by foreigners residing in her territory."^{1a} In fact, there actually exist three principal systems in regard to the enjoyment of civil rights by aliens residing in foreign territory. That of the common law, in which aliens do not enjoy all the civil rights; that represented by France, in which the enjoyment of such rights depends upon reciprocity by treaty, except in case of those who have been permitted by the Government to establish their domicile in France and continue to reside there, in which case they enjoy all the civil rights; and that headed by Italy, which is the most progressive one, in which foreigners are placed, in principle, on the same footing as the citizens in regard to civil rights.²

On the American Continent, the Republics of Argentine, Chile, Uruguay, and Guatemala incorporated into their laws the Italian view. But it should be admitted that the tendency in the civilized nations is at present in favor of the last system, and such is also the views of some eminent authors.³ These authorities, however, hold that in regard to the enjoyment of civil rights there are some limits beyond which a foreigner can not go. The distinguished German writer⁴ who favors the enjoyment of privileges by aliens without reciprocity says that "strangers must be denied all rights which, without being in truth political, *i. e.*, implying a certain share in the government of the state or of the community, assume in their nature a permanent attachment to it." For instance, foreigners can never claim that in school instruction any regard should be given to their language; they have no concern in such matters. The eminent Italian writer who is a champion of the most liberal concessions to

^{1a} See Calvo, Vol. II, p. 193. Also Al. Rivier, Vol. II, p. 189.

² See articles 11 and 13 of the Civil Code of France, and article 3 of the Civil Code of Italy; see also Pr. Fodéré, Vol. III, pp. 634, 635; P. Fiore, *Le Droit International Privé*, Vol. I, § 279.

³ See P. Fiore, *Trattato di Diritto, Internazionale Pubblico*, Vol. I, p. 456, ed. 1904; also Bar, *Private Inter. Law*, p. 212.

⁴ Bar, *Private Inter. Law*, p. 211; also P. Fiore, *op. cit.*

foreigners admits the right of the state to curtail or regulate the exercise of the enjoyment of such rights.

Now, if we inquire into the practice of civilized nations, we find that even in those countries where the most liberal and progressive laws exist in favor of aliens residing in their territory, such aliens are far from enjoying all the civil rights and privileges attached to citizenship. But in no country does a foreigner enjoy more rights and privileges than a citizen, and such an anomaly is not to be thought of in civilized communities.

Both theory and practice being against the grant to foreigners of all civil rights without exception, let us now see whether aliens residing in foreign territory and being entitled to enjoy all the civil rights, either by the laws of such foreign country or by special treaty, have the right to attend the public educational institutions of such foreign country. Is such a privilege included in the civil rights enjoyable by aliens? or has a state the right either to deprive them of such advantages or to make such regulation in regard to such institutions as she may deem necessary for her peace and internal tranquillity or for the furtherance of the interests of her own citizens? In short, is the benefit of education inherent in the enjoyment of the civil rights guaranteed by treaty or granted to a foreigner by the laws of the state?

No state seems to have gone so far as to claim such a privilege for her citizens, residing in foreign territory, by the mere right of the enjoyment of civil rights guaranteed by international compact, and contrary to the laws of such foreign nation. On the contrary, if we are to be guided by the actual practice of civilized communities, we find that such privileges are always considered as being special favors conceded to aliens, and as pure acts of international courtesy and politeness. As a matter of fact, states exclude aliens from their military or naval colleges and confer such privileges only on special occasions. In regard to other educational institutions, as it is more advantageous, both from the political and financial point of view, to grant rather than to withhold such a privilege, the doors of the educational institutions of a nation are generally opened to foreigners; but it should not be inferred from this that a

state does not possess, or retain, the power to exclude foreigners from such institutions or discriminate between them in regard to educational privileges.

If we examine the system of Republican France, we see that, besides her military and naval schools, to which the admission of foreigners is granted only in exceptional cases, as in all other countries, even in some of the other educational institutions of an entirely different character such admission is granted either by a ministerial decree or special permit of the competent authority. Thus, foreigners are permitted to pursue their studies in the universities, by the ministerial decree of June 24, 1840, which is still in force. This clearly shows that the Government may at its discretion grant or prohibit the admittance of foreigners to its public educational institutions. Again, in some other schools of that country the entrance of foreign students can be secured only through the respective diplomatic agent of such foreigners at Paris and the authorization of the Minister of Public Instruction, or other minister under whose direction such institution comes. Such, for instance, is the case with the schools of engineering of the Ponts et Chaussées and that of the Mining School. The same rule applies to the Veterinary College and even the Conservatory of Music of Paris. In all these educational institutions the Government has full authority to discriminate between such and such a foreigner, by granting admittance to one and refusing it to the other. The clause "of the most favored nation" in the treaties between France and foreign states can not possibly give rise to any complaint, because the rights and privileges of residence, granted to foreigners by treaty stipulations, can not justify a foreign intervention in such matters.

Likewise in Spain, by a royal decree, aliens are admitted to the educational institutions of the country with the same rights as the Spanish subjects.⁵

It is not usual for states to bind themselves by treaty to grant educational privileges to aliens, for the simple reason that such courtesies are not only generally extended, but encouraged as further-

⁵ See Torres Campos, *Elementos de Derecho, Internacional Privado*, p. 210, ed. 1906.

ing the interests of a country through the spread of its language and literature, and the treaties that actually exist in educational matters have been concluded either in order to facilitate the admission of students to foreign educational institutions by considering their school certificates as being equivalent to those of their own citizens,⁶ or with a view of securing a mutual compulsory or gratuitous education.⁷ The treaty of July 28, 1868, between the United States and China, in which a special provision was inserted for securing mutual educational privileges for the respective citizens of both countries, is a rare exception. Some of the provisions of that instrument have still a binding force as not having been abrogated by any subsequent convention, as it is provided in Article XVII of the treaty of October 8, 1903.⁸ According to article 7 of the treaty of 1868 "Citizens of the United States shall enjoy all the privileges of the public educational institutions under the control of the Government of China, and, reciprocally, Chinese subjects shall enjoy all the privileges of the public educational institutions under the control of the Government of the United States, which are enjoyed in the respective countries by the citizens or subjects of the most favored nation." (*Ibid.*, p. 157-158.) From the wording of this provision it is evident that these privileges are limited to the educational institutions under the control of the Federal Government and not to those of the States of the Union. Now, according to article 6 of the same instrument "Chinese subjects visiting or residing in the United States, shall enjoy the same privileges or immunities and exemptions in respect to travel or residence, as there may be enjoyed by the citizens or subjects of the most favored nation." Likewise, Article III of the immigration treaty of November 17, 1880, with the same power, reiterates the enjoyment of the same privileges by the citizens of both parties. As these provisions also have not been abrogated by a subsequent treaty, they are still in force, as provided in article

⁶ See treaties of 1904 between Spain, Colombia, Guatemala, and Mexico, and that of 1905 with Salvador, *Ib.* Torres Campos.

⁷ See treaty of 1887 between France and Switzerland.

⁸ See Senate Documents, vol. 37, p. 155.

13 of the treaty of 1903. Therefore, if the construction given to the treaty by Japan should prevail and the San Francisco Board of Education should be enjoined to admit the Japanese pupils into the schools assigned for white people, the right of admittance of Chinese pupils could not be denied, since they also enjoy in regard to residence the same privileges as the subjects of Japan. But it should be observed that if the expression, "the enjoyment of the rights and privileges of residence," covered the educational advantages also, the insertion of a special provision to that effect in the treaty of 1868 with China would have been superfluous.

In article 11 of the treaty of 1882 between the United States and the Kingdom of the Chosen (Korea), which is still in force, as not having been abrogated by the now suzerain power of the Flower Kingdom (Japan)—although the Chosen Kingdom has no more choice in this than in any other matter, because it has been particularly chosen by the Flower Kingdom to atone the sins of others—we read that "students of either nationality, who may proceed to the country of the other, in order to study the language, literature, laws or arts, shall be given all possible protection and assistance in evidence of cordial good will."⁹ There is nothing obligatory in this treaty for either party, but it only proves the desire at least for some kind of moral obligation in regard to educational facilities.

France and Switzerland, wishing to reciprocate compulsory as well as gratuitous education for their respective citizens residing in the territories of the other, concluded a convention to that effect on December 14, 1887. In Article I of that instrument it is provided that "the children of the Contracting Parties shall receive a gratuitous education in the primary schools of each state and that besides such education shall be compulsory."¹⁰ Now, assuming that the enjoyment of the rights and privileges of residence in the treaties either with China or with Japan have as a corollary the right of attending the public schools in California by Chinese or Japanese pupils, it is still questionable whether the segregation of such pupils of Mongolian descent, providing equally good educational advantages

⁹ Senate Documents, vol. 37, p. 494.

¹⁰ See J. de Clerg, *Recueil des Traités de France*, vol. 17, p. 506, 1887.

for them, could be considered as a real discrimination and consequently a violation of the alleged treaty rights. As we shall presently see, the supreme courts of various States, and that of the United States, held in numerous cases that the assignment to colored pupils of separate school buildings, provided they receive the same educational advantages as the white people, is not a discrimination, but a mere classification and consequently not a violation of the enjoyment of the equal rights and privileges with white people. It is very likely that the same principle will be applied in the case of Japanese, Chinese, or other alien pupils who might be entitled to the educational privileges of the country by international compact.

From the above exposition it may be seen that there is a well-established principle of the law of nations that aliens whilst residing in foreign territory can not by right obtain admittance to the educational institutions of such country, unless there is a treaty stipulation expressly mentioning the grant of such a privilege, and that the mere right of residence with all its privileges can not be considered as being sufficient to justify a claim for admittance by foreigners to such educational institutions. Therefore, the claim of Japan that her treaty rights have been violated by the action of the Board of Education at San Francisco does not seem to be founded either in theory or in usage; but as a sovereign power Japan is at full liberty, if she considers the action of the California authorities as an act of discourtesy, to resort to "retortion," *i. e.*, to apply the same treatment to students from California residing in Japan or she may even extend such retaliation to all American students within her territory. But between a violation of a treaty right and an infringement of the rules of the "comity of nations," there is a great difference — the former giving the right to denounce a treaty; the latter justifying a state in resorting only to friendly retaliation.

The second point connected with the present incident is that touching Federal or State constitutional law.

Assuming that the treaty of 1894 guarantees to Japanese subjects the right of admittance to the public schools of San Francisco, with the same privileges as those enjoyed by the citizens of the United States, let us now see whether the statute of the legislature of Cali-

ifornia ordaining the segregation of pupils of Mongolian descent is constitutional and whether it does not violate the privileges and immunities guaranteed by the Fourteenth Amendment to the Federal Constitution. Can such a separation of Mongolians from white pupils in the schools be considered a discrimination in the proper sense of the word?

According to the Fourteenth Amendment, section 1, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States * * * nor deny to any person within its jurisdiction the equal protection of the laws." Does the law of California violate the Federal Constitution by separating white from Mongolian children in the public schools of that State? The question of the constitutionality of an act of the legislature prescribing the separation of white from colored pupils was tested at various times in the State and Federal courts, and in all these cases it was held that such statutes were constitutional, provided no discrimination was made in the educational advantages for the pupils of either race. One of the earliest cases bearing upon this question is that of *Roberts v. The City of Boston*,¹¹ which came up in 1849, and therefore long before the adoption of the Fourteenth Amendment, but the ruling of that decision has been followed in other cases and frequently quoted in cases even since the adoption of the Fourteenth Amendment. The question involved in that case was whether the School Committee of Boston had power, under the constitution and laws of the State, guaranteeing equal rights to all citizens, to establish separate schools for colored children. The Supreme Court of that State in an elaborate opinion held that "the power of general superintendence vested a plenary authority in the committee [the School Committee] to arrange, classify, and distribute pupils in such a manner as they thought best adapted to their general proficiency and welfare. * * *" That "when the power was reasonably exercised, without being abused or perverted by colorable pretenses, the decision of the committee should be deemed conclusive." The court proceeded to say: "It is urged that this maintenance of separate schools tends to deepen and perpetuate the odious

¹¹ 59 Mass., 198.

distinction of caste, founded in a deep-rooted prejudice in public opinion." "This prejudice," added the court, "if it exists, is not created by law, and probably can not be changed by law. Whether this distinction and prejudice, existing in the opinion and feelings of the community, would not be as effectually fostered by compelling colored and white children to associate together in the same schools may well be doubted."¹² Therefore the act of the committee separating the white from colored people was sustained as not being contrary to the constitution of the State, guaranteeing equal privileges to all citizens.

Since the adoption of the Fourteenth Amendment cases of this nature have been very frequent in the various State and Federal courts and in all the constitutionality of statutes directing the separation of white from colored pupils has been fully sustained. In 1874 the Supreme Court of California, in *Ward v. Flood*,¹³ held that the school law of that State, by which the education of colored and Indian children should be in separate schools, was constitutional, and that the privilege of attending the public schools of the State was not a privilege or immunity appertaining to a citizen of the United States as such. The same principle was subsequently affirmed in the case of *Wysinger v. Crookshank*; ¹⁴ also in *Maddox v. Neal*.¹⁵ The constitution of North Carolina provides that "white and colored children shall be taught in separate schools, but that there shall be no discrimination in favor or to the prejudice of either race." In *Hooker v. Town of Greenville*,¹⁶ and in *McMillan v. School Committee*,¹⁷ the Supreme Court of that State maintained that its constitution was not a violation of the Fourteenth Amendment. The same view has been held by the supreme courts of other States.¹⁸

¹² See also *State v. The City of Cincinnati*, 19 Ohio, 178, and *Van Camp v. Board of Education*, 9 Oh. St., 407.

¹³ 48 Cal., 36.

¹⁴ 82 Cal., 588.

¹⁵ 45 Ark., 121.

¹⁶ 130 N. C., 472.

¹⁷ 107 N. C., 609.

¹⁸ In Missouri in 1890. in the case of *Lehew v. Brummell*, 103 Mo., 551, and in W. Virginia. in 1896. in *Martin v. Board of Education*, 42 W. Va., 514.

In the case of *Nevada v. Duffy*, in 1872,¹⁹ the Supreme Court of that State held that the statute prescribing that negroes, Mongolians, and Indians shall be educated in separate schools was constitutional. "While it may be, and probably is," said the court, "opposed to the spirit of the Federal Constitution, still it is not obnoxious to its letter; and as no judicial action," added the court, "is more dangerous than that most tempting and seductive practice of reading between the written lines, and interpolating a spirit and intent other than that to be reached by ordinary and received rules of construction or interpretation, such course will be declined." The court concluded by saying that it was perfectly within the power of the school trustees "to send all blacks to one school, and all whites to another; or to make such a classification, whether based on age, sex, race, or any other existent condition as may seem to them best." During the same year the Supreme Court of New York, in the case of *The People v. Easton*,²⁰ held the same view. "It is urged," said the court, "that this regulation of the Board [of Education] is in violation of the Fourteenth Amendment of the Constitution of the United States. This prohibits the State," proceeded the court, "from making or enforcing any law which shall abridge the privileges and immunities of citizens of the United States. * * * What privilege of a citizen is abridged thereby? Certainly none, unless every citizen has the privilege of choosing to which school, in a city, he will send his children." In the case of *Dallas v. Fosdick*,²¹ the same court said that "the right to be educated in the common schools of the State is one derived entirely from the legislation of the State;" and that "as such it has at all times been subject to such restrictions and qualifications as the legislatures have from time to time deemed it proper to impose upon its enjoyment." "It is not one of those inherent and paramount rights which the people by constitutional provisions have placed beyond the reach and control of legislation." The same view is reaffirmed in

¹⁹ 7 Nev., 342.

²⁰ 13 Abb. Pr. (N. Y.), 159.

²¹ 40 How. Pr. (N. Y.), 249.

subsequent cases, such as in *People v. Gallagher*.²² After reviewing the case the court said that "the system of authorizing the education of the two races separately has been for many years the settled policy of all departments of the State government, and it is believed obtains favor very generally in the States of the Union." In the comparatively recent case of *Cisco v. The Board of Education* (1900),²³ the opinion of the same court was handed down by C. J. Parker [ex-Democratic candidate] sustaining the constitutionality of the school law of the State in regard to the same matter.

In 1871 the Supreme Court of Ohio, in *State v. McCann*,²⁴ held that the statute of the State separating colored from white pupils was not in violation of the Fourteenth Amendment of the Federal Constitution guaranteeing equal privileges and immunities to all citizens. "What are these privileges or immunities?" said the court. "The language of the clause, taken in connection with other provisions of the amendment, and of the Constitution of which it forms a part, affords strong reasons for believing that it includes only such privileges or immunities as are derived from or recognized by the Constitution of the United States." "A broader interpretation," added the court, "opens into a field of speculative theories, and might work such limitations of the power of the States to manage and regulate their local institutions and affairs as were never contemplated by the amendment." The court concluded by saying that "the State law does not deprive colored persons of any rights, but only regulates the mode and manner in which this right would be enjoyed by all classes of persons," and that "the equality of rights did not involve the necessity of educating white and colored persons in the same school, any more than it did that of educating children of both sexes in the same school." In the case of *Cory v. Carter*,²⁵ the Supreme Court of that State, in 1874, rendered a decision in which by very forcible language it sustained the constitutionality of the statute passed by the general assembly of that State authorizing

²² 93 N. Y., 438.

²³ 161 N. Y., 598.

²⁴ 21 Ohio, 198.

²⁵ 48 Ind., 327.

the school trustees to organize separate schools for colored pupils, with all the rights and privileges of white pupils. The court, after reviewing the case, said that the right of a colored pupil to attend schools for white pupils in a State where such a system exists is lost in the State in which such separation is ordained by the law of that State, "because it was not one of those fundamental rights accompanying the person, but a domestic regulation exclusively within the constitutional and legislative power of each State, necessary for the good of the whole people. * * * " Then referring to the Fourteenth Amendment, the court said "that had not delegated to the Federal Government the power to regulate and control the domestic institutions of a State;" that the Federal Constitution did not "vest in Congress any power to exercise a general or special supervision over the States on the subject of education. In the school system there ought to be a classification of pupils, and this classification on the basis of race or color and their education in separate schools involve questions of domestic policy; and they do not amount to an exclusion of either class." One of the best reasons for this right of separation given by the court is that at the time of the submission of the Fourteenth Amendment by the Thirty-ninth Congress to the States of the Union an act was passed by the same Congress (July 23, 1866) in regard to the schools of the District of Columbia, by which the City of Washington and Georgetown were required to pay over to the trustees of colored schools certain moneys for school purposes, and by a subsequent act certain lots in the City of Washington were donated for the "sole use of colored children in colored schools," and the Forty-second Congress, by another act, directed the proportion of school money to be given to the trustees of the schools for colored children.²⁶ The court concluded by saying: "This legislation of Congress continued in force, as legislative construction of the Fourteenth Amendment and a legislative declaration of what was thought to be lawful, proper, and expedient under such amendment, by the same body that proposed such amendment to the States for their approval and ratification."

²⁶ See Congressional Globe, vol. 70, p. 1753.

In the case of *Berea College v. Commonwealth*,²⁷ which was tried last year (1906), the Court of Appeals of Kentucky upheld also the constitutionality of a statute separating white from colored pupils.

The decisions of the various State courts upon this question have been sustained by the Supreme Court of the United States, judging from the special references made to it in different cases, though the points at issue there were of a different nature. In *Hall v. De Cuir*,²⁸ which came up before the court in 1877, Mr. Justice Clifford, after concurring in the decision of the court on the main issue, said: "School privileges are usually conferred by statute, and, as such, are subject to such regulations as the legislature may prescribe;" that "it is settled law there that a board of education may assign a particular school for colored children, and exclude them from schools assigned for white children, and that such a regulation is not in violation of the Fourteenth Amendment." In *Plessy v. Ferguson*²⁹ the same court, in 1895, sustained the constitutionality of the laws of the various State legislatures separating white from colored children in schools. The question in that case was as to whether the act of the legislature of Louisiana providing separate railway carriages for the white and colored races was constitutional and not in violation of the Fourteenth Amendment. The court said: "The object of the Fourteenth Amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either." "Laws permitting and even requiring," proceeded the court, "their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally if not universally recognized as within the competency of the State legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored

²⁷ S. W. Rep., 623.

²⁸ 95 U. S., 485.

²⁹ 163 U. S., 537.

children, which has been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced." The court concluded by saying that "the argument assumes that social prejudices may be overcome by legislation, and that equal rights can not be secured to the negro except by an enforced commingling of the two races. We can not accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits, and a voluntary consent of individuals." "Legislation," said the court, "is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal, one can not be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States can not put them upon the same plane."

In numerous cases the various State courts and, in some, the Supreme Court of the United States held that the statutes of the State legislatures prescribing separate coaches or vehicles of transportation for white and colored people were not in violation of the Federal Constitution, and that the States were at liberty to legislate upon such matters. Furthermore, State laws prohibiting intermarriage between white and colored persons were not declared unconstitutional.

Therefore, if the Japanese, during their residence here, are placed on the same footing with the citizens of the United States by the clause of the most-favored nation in the treaty of 1894, it is evident from the above exposition of the settled law of the country that their exclusion from the schools assigned to white pupils can not be considered as a discrimination, and consequently there is no violation of a treaty right.

The last question to be examined is as to whether a treaty concluded by the United States Government and ratified by the Senate can supersede all State rights. Article VI of the Federal Constitution declares that " * * * all treaties made or which shall be

made under the authority of the United States shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding." As the Supreme Court of the United States well observed in the case of *Chew Heong v. United States*:³⁰ "Aside from the duty imposed by the Constitution to respect treaty stipulations when they become the subject of judicial proceedings, the court can not be unmindful of the fact that the honor of the Government and people of the United States is involved in every inquiry whether rights secured by such stipulations shall be recognized and protected." Therefore, the utmost care should always be taken in the conclusion of an international compact, in which not only the interests but also the honor of the country are at stake. Considering the complexity of the constitutional structure of the United States and the difficulty of enforcing treaty obligations in the States of the Union, it is evident that no ordinary wisdom, combined with knowledge and tact, is required to coordinate the rights of States in regard to their domestic government with the international engagements affecting the interests or rights of foreigners residing in the United States. Generally speaking, and as a question of principle, the consensus of opinion both of State and Federal courts and the views of eminent writers on the subject is that a treaty being in the United States the law of the land can supersede both State laws and State constitutions. The question is so well settled that it would be superfluous to quote any decisions or opinions in support of that view.

It has been held in some cases that the treaty-making power can confer by treaty upon aliens certain rights the enjoyment of which is prohibited by State law to such aliens, such as the right of holding realty by purchase or by descent or inheritance, and that in such a conflict between a State law and a treaty right the latter shall prevail. The only doubt that exists is whether the treaty-making power can assume international obligations which may encroach upon the fundamental rights of States, *i. e.*, upon those rights which have not been delegated to the Federal Government, and were intended to be retained by the States exclusively. Some distinguished writers

on constitutional law, discussing the question, seem to favor the view that the treaty-making power possesses an unlimited authority in the conclusion of treaties, and that the stipulations of such an instrument, once concluded, are obligatory upon the States of the Union; but others, equally distinguished, are of the opinion that a treaty, contrary to the Federal Constitution and encroaching upon the fundamental rights of States which have not been delegated to the Federal Government, can not be valid.³¹

As far as judicial decisions bearing upon this point are concerned, there does not seem to exist at present any final and clear opinion of the highest judicial authority of the country. It would not, however, be amiss here to mention a decision on that point, given by the Supreme Court of California in the case of *People v. Negbee*,³² in which that court held that the General Government did not possess unlimited powers in treaty matters. "In determining," said the court, "the boundaries of apparently conflicting powers between the States and General Government the proper question is not so much what has been in terms reserved to the States, as what has been, expressly or by necessary implication, granted by the people to the National Government. * * *" Then, referring to the crucial point as to whether in case of conflict between State laws and a treaty the latter is binding or not upon the State, the court said: "But even if the provisions of the statute did clash with the stipulations of that or of any other treaty, the conclusion is not deducible that the treaty must therefore stand and the State law give way. The question in such a case would not be solely what is provided by the treaty, but whether the State retained the power to enact the contested law, or had given up that power to the General Government. If the State retains the power, then the President and the Senate can not take it away by a treaty. A treaty is supreme only when it is made in pursuance of that authority which has been conferred upon the treaty-making department and in relation to those

³¹ See *Treaty-Making Power of the United States*, by Charles H. Butler, Vol. I. p. 395, where the views of various authorities are given. See also Wharton *Dig. of Inter. Law*, vol. 2, § 138 *et seq.*

³² 1 Cal., 232.

subjects the jurisdiction over which has been exclusively entrusted to Congress. When it transcends these limits, like an act of Congress which transcends the constitutional authority of that body, it can not supersede a State law which enforces or exercises any power of the State not granted away by the Constitution. "To hold any other doctrine," said the court, "would, if carried out into its ultimate and possible consequences, sanction the supremacy of a treaty which should entirely exempt foreigners from taxation by the respective States, or which should even undertake to cede away a part or the whole of the acknowledged territory of one of the States to a foreign nation."³³

In the first and most important treaty case of *Ware v. Hylton*,³⁴ which was decided in 1795, Justice Chase, handing down the opinion of the court, declared that every treaty made by the authority of the United States would be superior to the constitution and laws of any individual State, and then referring to the question as to whether the court possessed any power to decide that Congress could by treaty annul the laws of the States, and destroy vested rights, said that "if the court possesses a power to declare treaties void, I shall never exercise it but in a very clear case indeed."

In the license cases,³⁵ the same court said: "Laws of the United States, in order to be binding, must be within the legitimate powers vested by the Constitution. Treaties, to be valid, must be made within the scope of the same powers; for there can be no 'authority of the United States,' save what is derived mediately or immediately, and regularly and legitimately, from the Constitution. A treaty, no more than an ordinary statute, can arbitrarily cede away any one right of a State or of a citizen of a State." In the *Cherokee Tobacco Case* ³⁶ the court expressed its opinion as follows: "It need hardly be said that a treaty can not change the Constitution or be held valid if it be in violation of that instrument." Again in *Holmes v. Jennison*,³⁷ Chief Justice Taney, speaking for the court, said:

³³ See also *United States v. Rhodes*, 1 Abb., 28.

³⁴ 3 Dall., 199.

³⁵ 5 How., 504, 613.

³⁶ 11 Wall., 617.

³⁷ 14 Peters, 540.

"I am ready to admit that the President and Senate can make treaties which are not themselves repugnant to the Constitution." And lastly, in *Hauenstein v. Lynham*³⁸ the court, after upholding the efficacy of a treaty, said: "There were doubtless limitations of the treaty-making power as there were of all others arising under such instruments."

But if a divergence of opinion as to the limits of the treaty-making power exist, there is hardly any regarding the power of Congress to nullify the provisions of a treaty by a subsequent act. It has been held in various cases that if the provisions of an act are in conflict with the stipulations of a treaty, the former shall prevail; and that the Constitution does not give to a treaty superiority over an act of Congress. This assumption by Congress of the right to abrogate a treaty by a subsequent act can not be considered as a novelty, because every sovereign state has the right to denounce a treaty, independently of the consequences which might result from an *ex parte* action, giving rise to a diplomatic conflict.

But can the General Government with the Senate, by a treaty, grant to aliens more rights and privileges than those enjoyed by the citizens of the United States? In the treaties in which the clause of the most-favored nation is inserted, the subjects or citizens of the contracting parties are entitled to enjoy the same rights and privileges as the subjects or citizens of the other contracting party or as those enjoyed by other aliens. In the treaty cases which have been adjudicated by the Supreme Court of the United States, the object was to place aliens on the same footing with citizens in regard to the enjoyment of certain civil rights, and not to grant them more rights and privileges than those enjoyed by citizens. If, by the treaty of 1894, the Japanese subjects should have been entitled to enjoy the right to be educated in the public schools of the States of the Union or of those under the control of the Federal Government, with white people, contrary to the laws of such States and the acts of Congress assigning particular schools for colored, Mongolians, or Indians, this paradox would follow: The Mongolian citizens of the United States by birth, such as Chinese and Japanese citizens

or the people of African descent and Indian citizens, would be excluded from such schools for white people by virtue of a State law or an act of Congress, as in the District of Columbia, and aliens, such as Japanese, Chinese, or colored subjects of Great Britain, France, and other States, or Mexican Indians, would have free access to all the public educational institutions of the country.

By the Civil Code of California, section 60, all marriages of white persons with negroes, Mongolians, or mulattoes are illegal and void. Similar laws exist in many States of the Union, especially in regard to intermarriage of white with colored people. Now, can the foreign nations, such as Japan, China, and others having Mongolian or colored subjects, by virtue of the clause of the most-favored nation, inserted in treaties with the United States, in regard to the rights of residence with all its rights and privileges, claim that their respective subjects are entitled to intermarry with white people in the States in which such mixed marriages are prohibited by law?

As a matter of fact such laws prohibiting intermarriage of the white and other races have been upheld as being constitutional. Thus in *Plessy v. Ferguson*,³⁹ the Supreme Court of the United States said that "the laws forbidding the intermarriage of colored with white people, though technically interfering with the freedom of contract, were universally recognized as within the police power of the State." But that "the exercise of the police power should be reasonable and in regard to the reasonableness of a statute the legislature of a State is at liberty to act with reference to the established usages, customs, and traditions of the people, and with a view to the promotion of their comfort and the preservation of the public peace and good order."

Therefore, can the treaty-making power by special international compact override such a law by granting to aliens, who are forbidden by law to intermarry with white people, the right of such marriage, whilst the citizens of the United States of the same category are precluded from doing so? It is superfluous to multiply the examples in order to show the anomaly and incongruity which would result from the unlimited power of granting rights and privileges by treaty

to foreign subjects in excess of those enjoyed by the citizens of the United States.

To revert to the treaty of 1894 with Japan and those with China, which guarantee to Japanese and Chinese subjects certain rights and privileges, could it be supposed that the two-thirds majority necessary for the ratification of these treaties would have been secured in the Senate had it been understood at the time that by granting such rights and privileges it would have set at naught the fundamental rights of States of the Union to enact a law ordaining the separation in the schools of Japanese or Chinese from white pupils?

It can not be denied that the admission of the Japanese view would create a most strange situation, to wit, that colored citizens of the United States — not to say anything of the aboriginal Indians — for whose sake so much blood has been shed in the country and whose rights have been so solemnly guaranteed by the constitutional amendments, should not be able to enjoy the same rights and privileges as the subjects and citizens of foreign states.

We may therefore conclude by saying that neither in the letter nor in the spirit of the treaty of 1894 with Japan is there anything which substantiates the claim of the Japanese Government to the right of education for her subjects in the public schools of the States of the Union, or in those under the control of the Federal Government; that such a right can not be deduced from the wording of the treaty and it can only be acquired by a special stipulation, and such is not the present case. That in the absence of such a privilege secured by treaty, the State of California has the right to exclude aliens from her schools or assign to them separate buildings for education; that in such cases a State shall have in view her own interests and conveniences and not those of aliens residing in her territory; that if the State of California has the right to exclude foreigners from her schools she has also the corollary privilege of granting such a right to some and refusing it to others; that it is the undisputed prerogative of a state to grant certain privileges to the subjects of one state and refuse them to those of another, unless she is precluded from doing so by a treaty stipulation containing the clause of the most-favored nation, with a special specification of the object in view; that other-

wise it would have been useless to insert such clauses in international compacts. Further conceding, for the sake of argument, that the clause of the most-favored nation in that treaty entitles Japanese subjects to the educational privileges of the State of California, still the action of the authorities at San Francisco in assigning to Japanese pupils separate schools can not be considered as a discrimination, in the proper sense of the word, at least as long as the educational advantages granted to them are not inferior to those of other schools of the State.

As above explained, such is the construction given by State and Federal courts in regard to the segregation of colored and Indian pupils, who, as citizens of the United States, are entitled to all the privileges and rights secured by the Federal Constitution. There is no reason why a different view should be held for and a different interpretation should be given to rights and privileges guaranteed by treaty to aliens. Would not such a situation look in the eyes of the world as a travesty of justice? Still, such is the dilemma with which administration might be possibly confronted, if it persists in favoring the construction given to the treaty by Japan, or if the treaty-making power concludes international compacts by which aliens are granted more rights than the citizens of the United States.

The CHAIRMAN. The next paper will be by Dr. William Draper Lewis, Dean of the University of Pennsylvania Law School.

ADDRESS OF DR. WILLIAM DRAPER LEWIS,
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Mr. Chairman and Members of the Society: A treaty made in pursuance of the Constitution is the supreme law. If a foreigner in the United States claims a right under a treaty which right conflicts with a State law, the State law is *pro tanto* abrogated, unless the United States in conferring the right has exceeded its constitutional power. It is therefore pertinent to the present discussion to ask the extent to which the Federal Government, acting under the treaty-making power, can confer rights on aliens? In this connection I

shall ask your indulgence for a few moments while I attempt to demonstrate not only the soundness but the importance of the proposition that under the treaty-making power the Federal Government can confer on the citizens of foreign countries any right the exercise of which does not run counter to some provision of the Constitution.

In approaching the subject there are certain constitutional principles relating to the treaty-making power which we may regard as settled. The first is that in this country treaties are an independent source of law. The Federal power to make treaties is more than the power to negotiate an agreement with a foreign government. From the moment the Senate ratifies a treaty its provisions, if constitutional, become part of the law of the land. An act of Congress is not necessary to give a treaty the force of law.

We may also regard it as equally well settled that the scope of the treaty-making power conferred on the Federal Government in the second article of our Constitution can not be ascertained by examining the grants of legislative power conferred on Congress by the first article. Because Congress under the first article has the power to lay and collect taxes, it does not follow that taxes can be laid and collected by treaty. On the other hand, that can be done by treaty which can not be done by act of Congress. Thus, while Congress has the power to pass laws establishing a uniform rule of naturalization, it has no power to confer on aliens, without naturalizing them, the right to inherit real property within the jurisdiction of a State. Yet so long ago as 1817 the Supreme Court, in *Chirac v. Chirac*, decided that a treaty regulating the rights of foreigners to inherit, purchase, and hold lands in the United States superseded any acts of the States conflicting therewith. The court has ever since followed the principle of that decision.

In the third place it will be admitted that whether all conceivable subjects are or are not proper subjects of treaty, the rights in the United States of citizens of a foreign country is a subject falling within the legitimate scope of the treaty-making power. This is not saying that a treaty conferring any conceivable right on an alien is necessarily constitutional, but merely that the subject

of the rights of foreigners in the United States is a natural and proper subject of treaty.

It is also important to appreciate the difference in the way in which the first article of the Constitution confers legislative power on Congress and the way in which the treaty-making power is conferred on the President and Senate in the second article. The first article declares that the Congress shall have power to legislate for certain enumerated ends; but the second article merely declares that the President "shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur." This treaty-making power, then, is at least a power to make treaties on all subjects which are usually matters of treaty between nations. Unlike the legislative power of Congress, it is not a power to make treaties on a limited number of enumerated subjects.

The constitutionality of a treaty of course can be attacked on the ground that the treaty in effect changes some clause of the Constitution, or violates some express prohibition on the Federal Government contained in the amendments. That a treaty which attempted to alter the Constitution would be unconstitutional may be admitted. Every power conferred on the Federal Government by the Constitution must be limited by the rule that it can not be so exercised as to change some express provision in the Constitution or violate a right expressly guarded by that instrument. The power to make treaties is not the power to amend the Constitution. Thus, a treaty which conferred on aliens the right to keep slaves within any place subject to the jurisdiction of the United States, contravening the Thirteenth Amendment, would be void, as would be a treaty which enabled a person, not a native-born citizen, to become President of the United States. Whether a right conferred on an alien by treaty does or does not violate some express provision of the Constitution, and to that extent attempt to alter the Constitution, may be often a question of some difficulty, but the principle that the Constitution can not be altered by treaty has been admitted by all judges and publicists who have had occasion to examine the subject.

But it is contended that there are other limitations on the treaty-making power besides those which necessarily arise from the wording of the different articles and amendments of the Constitution; that there are implied limitations on the exercise of this power deduced, not from the words of the Constitution, but from some theory of the nature of our Government. The contention that our Federal Government could not by treaty confer on Japanese children resident in California the right to attend the public schools of the State was based on a theory of implied limitations on the treaty-making power arising out of the nature of our Federal State. For, admitting that our treaty with Japan attempts to confer on Japanese citizens, resident in the United States, the right to send their children to the public schools of the State in which they reside, nothing in our Constitution as written is violated by such a treaty. If it is beyond the power of the Federal Government to confer such a right on foreigners resident in a State, it is because the treaty violates a limitation on the treaty-making power not deduced from the words of the Constitution.

We can hardly exaggerate the importance of preventing a theory of implied limitation on the treaty-making power gaining a foothold in our constitutional law. It is admitted that the Federal Government is one of enumerated powers. All powers not conferred on it or prohibited to the States are reserved to the States or to the people. But the power to make treaties has been conferred on the United States. If, therefore, we are to limit the extent of the power of the United States to deal with the subject of the rights of aliens in the United States, not by any clause in the Constitution as written, but by some theory of implied limitations not deduced from the words of the Constitution, then the same theory limits every other power of the Federal Government. And, furthermore, as the nature and extent of such a limitation can not be determined by referring to the words of the Constitution, its exact nature and effect is, and is destined to remain, uncertain. Let us turn again to the recent discussion of our treaty with Japan. It was said that the United States has no right to confer on alien residents in the State the right to attend the public schools, because it is contrary to

the theory of our Government that any Federal power should be so exercised as to interfere with the right of a State to hold its public property as a trust fund for the exclusive benefit of the citizens of the State. But are not the public parks and the public streets procured and maintained by State funds? Are they not also the exclusive property of the State? Is, then, the United States prohibited from giving to aliens the right to walk the highroads of a State, or the streets of its cities? If the State wills it, must the alien travel through its jurisdiction only over private property with permission of the owners, or are the rights which he may obtain under a treaty with the United States confined to the right of passing over the territory of a State in a balloon? Are we to draw, on some theory not yet suggested, a line between a treaty which confers on aliens the right to travel on the highways of a State or pass through its public parks, and a treaty which purports to give the alien a right to sit down on the benches in a public park?

When we first ask ourselves the question whether the United States can require a State which conducts a public school system to educate aliens, our normal mental reaction is to doubt the constitutionality of this exercise of Federal power. But is this not because we fail to distinguish between the spirit which in a Union like ours should guide all governmental action, Federal and State, and the technical extent of the constitutional powers of the Federal and State Governments? The spirit which should guide us is plain. It is that in the exercise of its undoubted powers the Federal Government should avoid as far as possible running counter to the local interests or prejudice of any State, and that the States, in the exercise of their undoubted powers, should avoid injuring the interests of any other State or of the United States. In short, the Federal Government should not disregard local interests, and, on the other hand, the States should learn, as our President has outlined, to "think nationally." The preservation of this spirit is essential to the continuation of the Union. But it is also essential that our desire to preserve this spirit should not cause us to read into the Constitution limitations or grants of power not expressed in that

instrument. To do so would mean that every law, whether State or national, would not only have to satisfy the written Constitution, but also our unwritten constitution. Our constitutional law, instead of being the same yesterday, to-day, and to-morrow, would vary with the rise and fall of political theories. In the middle of the last century emphasis was often laid on the implied limitations on Federal power arising out of the rights of the States; to-day we begin to hear about the implied limitations arising out of the rights of the citizens of the United States; to-morrow we may be talking about the implied powers necessarily inherent in a National Government.

It is a serious evil to have any part of our constitutional law uncertain. This is especially true of that part of our constitutional law which relates to the treaty-making power. The desirability of having its scope clearly understood can not be exaggerated. If the officers of the Federal Government in negotiating a treaty concerning the rights of aliens, or anything else, not only have to see to it that the treaty does not violate any of the provisions of the Constitution as written, but that it satisfies that theory of implied limitations on the treaty-making power which is for the moment dominant, they enter the negotiations with their hands tied. They can not be certain that any right which they offer to the citizens of the foreign country is within their power to offer. All governments must take notice that a treaty with the United States, though it ostensibly confers many rights on their citizens traveling or resident in this country, is, like an English patent, of little value until tested in the courts.

More disastrous, however, than any uncertainty in regard to the extent of the treaty-making power would be the result of the admission that the Federal Government could not constitutionally confer by treaty on citizens of foreign countries the ordinary rights of residence and travel in all parts of the United States. As a practical people, what we need is an intelligent discussion of the extent of the rights which we should confer on foreigners, not the working out — on some theory not found in the words of the Constitution — of elaborate rules for determining the exact nature and character

of the rights which the Federal Government may confer by treaty on the subjects or citizens of a foreign power.

If our Constitution expressly contained a theory of Federal power which requires us to go outside the words of the Constitution to find limitations on the exercise of any of the powers expressly granted to the Federal Government, it would be our duty to do so — at least until the Constitution could be amended. But our Constitution does not require us to wander into the realm of theory to find limitations on Federal power. We can therefore take the treaty-making power as we find it, without other limitations than that which arises from the rule that no power can be so used as to alter the Constitution as written.

The framers of our Constitution realized that it was essential that the young Republic, if it was to be free from foreign aggression, should present a united front to foreign nations; that from an international point of view at least we should become one people. The necessity of giving to the National Government a free hand in its negotiations with foreign countries was probably even clearer to them, knowing the weakness of the new country, than it is to us, who know her present strength. Though they properly prevented the hasty adoption of an unwise treaty by requiring that all treaties should be ratified by a two-thirds vote of the Senate — that body which primarily represents the States — they did not attempt to enumerate the subjects on which treaties should be negotiated, or direct the manner in which the subjects dealt with should be treated. It is true that the treaty-making power is a wide power — much wider than usually is realized. It had to be so, else the Constitution would have failed to accomplish one main reason for its adoption — namely, that the United States should become a nation capable of entering into agreements with other nations. And I believe that we will find that the good sense of the American people will prevent this power from being exercised in a wanton manner to the destruction of local interests.

The CHAIRMAN. The next paper will be by Prof. W. W. Willoughby, of Johns Hopkins University.

ADDRESS OF PROF. W. W. WILLOUGHBY,
OF JOHNS HOPKINS UNIVERSITY, BALTIMORE, MD.

Mr. Chairman and Members of the Society: The question of the rights of foreigners in the United States in cases of conflict between Federal treaties and State laws has recently received, in legal periodicals and in Congress, such thorough consideration in connection with the Japanese school matter in California that one necessarily feels an embarrassment, especially before such a gathering as this, in attempting to throw new light upon the subject. The most that he may hope to do is to place some additional emphasis upon phases of the topic which, it seems to him, have not been duly accentuated, or which have not been sufficiently developed, either with respect to the arguments by which they may be supported, or with regard to all the implications logically latent in them.

What I shall have to say will have reference to the constitutional limits of the treaty-making power in the United States. That there are constitutional limits, despite the fact that the Constitution grants the power without limitation, and the fact that in no case has there arisen the necessity for applying them, would appear beyond question. From the case of *Ware v. Hylton*, decided in 1796, to the *Insular Cases*, decided in 1901, the Supreme Court has, upon frequent occasions, stated, not only in general terms but with reference to specific matters, that there are limits to the subjects that may, by treaty, be made the supreme law of the land. In *New Orleans v. United States* (10 Pet. 662), speaking with reference to the treaty of 1803 with France, the Supreme Court said: "The treaty could not enlarge the constitutional powers of the United States." In *Pollard's Lessees v. Hagan* (3 How. 212) the same tribunal denied "the faculty of the Federal Government to add to its powers by treaty." In the *Cherokee Tobacco Case* (11 Wall. 620) the opinion declares: "It need hardly be said that a treaty can not change the Constitution, or be held valid if it be in violation of that instrument." In *Geofroy v. Riggs* (133 U. S. 267) the treaty power is declared to be limited by those restraints which are found in the Constitution "against the action of the Government or of its Departments, and those arising from the

nature of the Government itself and of that of the States." "It would not be contended," the opinion continues, "that the treaty power extends so far as to authorize what the Constitution forbids, or a change in the character of the States, or a cession of any portion of the territory of the latter." Finally, in *Downes v. Bidwell* (182 U. S. 244), the court says: "It seems impossible to conceive that the treaty-making power by a mere cession can incorporate an alien people into the United States without the express or implied approval of Congress." And, in the same case, the dissenting justices declare: "The grant by Spain could not enlarge the powers of Congress. Indeed, a treaty which undertook to take away what the Constitution secured, or to enlarge the Federal jurisdiction, would be simply void."

With reference specifically to the reserved rights of the States, the Supreme Court, in *Prevost v. Greenaux* (19 How. 7), says: "Whenever an act of Congress would be unconstitutional, as invading the reserved rights of the States, a treaty to the same effect would be unconstitutional." In the *License Cases* (5 How. 504) Justice Daniel declares: "A treaty no more than an ordinary statute can arbitrarily cede away any one right of a State or of any citizen of a State. And in the *Passenger Cases* (7 How. 283) Chief Justice Taney, in his dissenting opinion, lays down the doctrine that "any treaty authorizing the introduction of any person or description of persons [within its borders] against the consent of the State would be an usurpation of power which this court could neither recognize nor enforce." "I had supposed," he adds, "this question not now open to dispute."

In apparent inconsistency with these declarations is, however, the fact that, in a number of instances, treaty provisions with reference to State concerns not subject to congressional regulation have been upheld by the Supreme Court. Thus, especially, the treaty right of aliens to inherit and hold lands, State laws to the contrary notwithstanding, has been upheld. In a number of instances, also, State laws with reference to matters ordinarily within State cognizance have been held void when in conflict with existing Federal treaties. Examples of this are laws denying the rights of the alien

to be employed by contractors upon public works or to be employed by private corporations. In the famous *Queue Case*, decided in 1879 (5 Sawyer, 552), a California law was held void by Justice Field on circuit as in violation of rights secured by treaty to alien Chinese resident in the United States. These are examples, though not with reference to very important matters, in which Federal regulation by treaty has been upheld, when congressional legislation upon the same subjects would not have been.

How, now, are we to harmonize these declarations that the reserved rights of the States may not be infringed by the treaty-making power with the fact that, in specific instances, the invasion of these rights has been upheld?

Essentially speaking, the two positions thus absolutely stated can not be harmonized. There is no principle that can be stated which will bring the *dicta* quoted into consonance with the decisions referred to. Either the *dicta* denying to the treaty-making power the right to infringe State rights are wrong, and must be abandoned, or the decisions upholding such infringement were improper, and will not be followed in the future.

The author of this paper is convinced that the *obiter* doctrine that the reserved rights of the States may never be infringed upon by the treaty-making power will sooner or later be frankly repudiated by the Supreme Court. In its place will be definitely stated the doctrine that in all that relates to matters of international rights and obligations, whether these rights and obligations rest upon the general principles of international law or have been conventionally created by specific treaties, the United States possesses all the powers of a constitutionally centralized sovereign state; and therefore that when the necessity from the international standpoint arises the treaty power may be exercised, even though thereby the rights ordinarily reserved to the States are invaded.

The writer of this paper is led to the belief that this will be the position finally and affirmatively taken by our judiciary from a review of the manner in which, in the past, in every instance in which it has been necessary to endow the Federal Government with a power in order that its national supremacy, and its administra-

tive efficiency, might be preserved the Supreme Court of the United States has found the means to do so.

By a long series of opinions, one after another, the attempts of the States by legislation or otherwise to deny or in any way to interfere with the exercise of powers essential to the Federal Government as the agent of a constitutionally sovereign state have been defeated by the Supreme Court. During a four years' civil war the National Government was able to exercise all the authority of an autocratic power in preserving its existence. And after the termination of that struggle the Federal judiciary refused to interfere with the extraordinary measures which the exigencies of the reconstruction period seemed to demand.

Since the close of the civil war the theory of a sovereignty divided between the nation and its constituent Commonwealths has found few to do it reverence. National sovereignty has been acknowledged in theory as well as in fact. During the last twenty-five years, starting with this national sovereignty as an accepted fact, constitutional development has been in the direction of endowing the Federal Government with administrative powers adequate for the accomplishment of the purposes for which it is acknowledged to exist. Thus, in a remarkable series of instances, not only have Congress and the Supreme Court broadened the interstate commerce powers of the General Government, but in an equally striking line of decisions the courts have recognized in Federal executive officials the existence of spheres of administrative discretion the extent of which would have startled constitutional jurists of but a generation ago.

In these cases the Supreme Court has frankly argued that where, for the efficient performance of the administrative duties laid upon the General Government, it is necessary that an administrative order should take the place of a judicial process, the private rights of person and property are not to be allowed to stand in the way. In *Murray's Lessee v. Hoboken* (18 How. 272) it was held that an administrative officer could fix finally, without judicial review, the amount due the Government from a public official, and collect it by a distress warrant.

In *Springer v. United States* (162 U. S. 586) the power of the Government to collect a tax by a warrant issued by the collector was upheld. In *Smelting Co. v. Kemp* (104 U. S. 636) the administrative decision of the United States Land Office was held final as to the facts within its statutory jurisdiction.

The power of the Postmaster-General to exclude from the postal service the mail of concerns whose business he deems fraudulent has been sustained, though by statute the right of judicial review is denied, the Supreme Court saying: "If the ordinary daily transactions of the Departments which involve an interference with private rights were required to be submitted to the courts before action was finally taken, the result would entail practically a suspension of some of the most important functions of government." (*Public Clearing House v. Coyne*, 194 U. S. 497.) In *Bartlett v. Kane* (16 How. 263) the court refused to examine the correctness of an appraisement by an administrative officer of property for taxation, saying: "The interposition of the courts in the appraisement of importations would involve the collection of the revenues in inextricable confusion and embarrassment." Finally, and most extreme of all, with regard to the exclusion of aliens, it has been held that an administrative officer may decide finally, and even without taking testimony, whether or not a person claiming to be a citizen of the United States is in fact such, and therefore entitled to enter this country. (*United States v. Ju Toy*, 198 U. S. 253.) This decision Justice Brewer, in his dissenting opinion, characterized as "appalling;" but there is little chance that its doctrine will be disturbed in subsequent cases.

In a manner similar to that in which the National Government has thus by Congress and the Supreme Court been equipped with the powers necessary for the efficient performance of the administrative duties which modern industrial and commercial conditions have thrown upon it, the Supreme Court has, upon simple ground of necessity, sanctioned the exercise by the Federal Government of powers requisite to meet the problems assumed by it in the imperialistic policy upon which it has entered since the Spanish war.

In *De Lima v. Bidwell* (182 U. S. 1) the power of the United

States over its dependencies was declared to arise, not out of the territorial clause, but from the necessities of the case and from the inability of the States to act on the subject." In *Hawaii v. Mankichi* (197 U. S. 218), upon similar grounds of expediency, the right to jury trial was asserted not to extend to Hawaii, although by joint resolution Congress had declared that all local laws inconsistent with the Constitution of the United States should have no force. In *Downes v. Bidwell* the majority justices, Brown excepted, argue at length the practical necessity of conceding to the General Government the power of annexing foreign territory without incorporating it into the United States.

Upon the same grounds of expediency and practical necessity the Supreme Court, in *United States v. Kagama*, has sustained the continued exclusive control of the Federal Government over the Indians, even though their tribal autonomy is no longer respected by Congress.

Thus, in short, we see that from the beginning the General Government has been construed to possess all those powers the exercise of which are essential to its national sovereignty and to its administrative efficiency as such.

So, likewise, starting from the premise that in all that pertains to international relations the United States appear as one nation, the Supreme Court has deduced corresponding powers. It has declared that the United States may punish the counterfeiting in this country of the securities of foreign countries, upon the ground that otherwise we might find ourselves in international difficulties. It has authorized the annexation by statute of unoccupied territory — the Guano Islands — because other sovereign states possess this power. This, indeed, was the only basis upon which this act could be justified, for clearly it was not an act performed under either the treaty-making or war powers. It has sanctioned the power of the United States to establish in foreign countries judicial tribunals which are not bound by the constitutional limitations under which other Federal courts operate. It has warranted the United States in leasing and administering foreign territory. It has asserted the right of our Government to expel undesirable aliens from our midst

and to refuse them admission to our borders. Extradition and trade-mark treaties have been accepted without question.

These illustrations furnish sufficient warrant for saying that it is now an established principle of our constitutional law that the supreme purpose of our Constitution is the establishment and maintenance of a state which shall be nationally and internationally a sovereign body, and that all the limitations of the Constitution, express and implied, whether relating to the reserved rights of the States or to the liberties of the individual, are to be construed as subservient to this one great fact.

We are thus led to the conclusion that, in addition to the two generally recognized constitutional sources of Federal power, namely, the express grants of authority in the Constitution and the powers implied in these express grants, there is a third source, whence, in case of need, Federal authority may be obtained. This third class of powers may be described as those derivable directly from the fact that the United States is, with reference to its own citizens and its constituent Commonwealths, a fully sovereign national State, and, with reference to other States, a political power equipped with all the authority possessed by other independent states.

In a number of instances the Supreme Court has explicitly stated and applied this principle of construction.

Almost a hundred years ago Marshall declared that it was not necessary for the Federal Government to trace back every one of its powers either to express grants or to powers ancillary to them. In *Cohens v. Virginia* (6 Wh. 414) he said: "It is to be observed that it is not indispensable to the existence of every power claimed for the Federal Government that it can not be found specified in the words of the Constitution, or clearly and directly traceable to some one of the specified powers. Its existence may be deduced fairly from more than one of the substantive powers expressly defined, or *from them all combined*. It is allowable to group together any number of them and to infer from them all that the power claimed has been conferred." And later in the same opinion he says: "And it is of importance to observe that Congress has often exercised, without question, powers that are not expressly given nor

ancillary to any single enumerated power." Powers thus exercised are what are called by Judge Story, in his Commentaries on the Constitution, resulting powers, arising from the aggregate powers of the Government.

In the *Legal Tender Cases* (12 Wall. 457) Justice Bradley, after adverting to the national character of the General Government, said: "Such being the character of the General Government, it seems to be a self-evident proposition that it is invested with all those inherent and implied powers which, at the time of adopting the Constitution, were generally considered to belong to every government as such, and as being essential to the exercise of its functions."

In *United States v. Jones* (109 U. S. 515) the power of eminent domain was declared to be possessed by the United States as an "incident of sovereignty," and because it "belongs to every independent government."

In *Mormon Church v. United States* (136 U. S. 1) "the power to make acquisitions of territory by conquest, by treaty, and by cession" was declared to be possessed by the United States, not from any express or otherwise implied power, but because these are "an incident of national sovereignty."

In *Fong Yue Ting v. United States* (149 U. S. 698) "the right to exclude or expel all aliens, or any class of aliens, absolutely or upon certain conditions in war or in peace," was declared to belong to the United States as "an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence, and its welfare." And the court adds: "The United States are a sovereign and independent nation, and one vested by the Constitution with the entire control of international relations, and *with all the powers of government necessary to maintain that control and to make it effective.*"

Reasoning from these decisions, and guided by analogy drawn from the manner in which in all necessary cases the national sovereignty and the administrative efficiency of the General Government has been sustained, we are amply justified in the belief that the Supreme Court, when occasion arises, will find no difficulty in granting to the treaty-making power of that Government adequate author-

ity to regulate all proper matters of international agreement, whatever may be the reserved rights of the States or the guaranteed privileges of the individual. If neither of these have been allowed to stand in the way of the national sovereignty and the administrative efficiency of the United States Government, it is not to be believed that they will be permitted seriously to hinder that Government in the exercise of its international functions.

Assuming, then, that the reasoning which has gone before is correct, it may be asked: Are we led to the conclusion that, in extent, the treaty-making power is without constitutional limits, and may it be predicted that in no conceived case will the Supreme Court hold void of legal force a treaty duly entered into by the treaty-making power? This question may be answered in the negative. As pointed out at the beginning of this paper, there undoubtedly are limits to the extent of the treaty-making power which the Supreme Court may be expected to recognize and apply.

It is true that all of the *dicta* that were quoted are *obiter* in that in no instance were they applied to hold a treaty provision void; yet, when we find the statement so positively asserted, and so many times repeated, we may, I think, take it as established.

If, however, as we have seen, individual rights and the reserved powers of the States may, upon occasion, be sacrificed to the treaty-making power, under what circumstances, and according to what principle, may we expect these limitations to be imposed? Briefly speaking, the answer to this question is that the degree of the necessity will measure the extent of the treaty-making power.

Just as the courts recognize that there are limits to the military power of a commander of an armed force, not only under martial law, in time of peace, but in time of war; that, in similar wise, the police powers of the States and of the nation are not susceptible of purely arbitrary exercise; that, in both cases, absolute necessity, actual or fairly presumed, alone will justify the violation of civil rights of person and property — so, with reference to the treaty-making power, where the international agreements entered into by it relate to matters ordinarily reserved to the States, the necessity, from the standpoint of the international peace and welfare of the United

States, when made apparent, will control. The more pronounced the infringement upon the reserved spheres of the States, however, the more urgent must this international necessity be shown to be. But it must be admitted that should an extreme necessity arise, there is no reserved right of the States or, it may be added, of individuals which can or, it may be predicted, will be allowed successfully to resist the treaty-making power.

The principle which has been stated that to be constitutionally valid a treaty must have reference to a subject properly a matter for international agreement, and furthermore, that if it provide for the regulation of a question falling within the ordinary legislative competence of the States, it must be justified by the needs and convenience of the United States as an international power — this principle excludes from the Federal treaty-making power the authority to disregard those prohibitions of the Constitution, express and implied, which are directed not to Congress but to the National Government as a whole.

It is scarcely to be conceived that the treaty-making power will ever make the attempt, but should it make the attempt to override these prohibitions, or to alter the distribution of powers provided for in the Constitution, or in any way to change the general character of the governmental polity by that instrument created, it may be expected that the judiciary will interpose its veto. The treaty-making power in all its fullness is granted that the National Government may be preserved, to be efficient for the purposes for which it is created, not that it may be destroyed or changed in essential character.

It is a principle of international law that treaties between nations should be executed with *uberrima fides*. Undoubtedly, however, our courts, in construing a treaty which infringes upon the ordinary reserved rights of the States, will, when possible, so interpret it as to minimize so far as possible the extent of this infringement. And, undoubtedly, the treaty-making power itself will, when possible, refrain from entering upon treaties which will trench upon the States' reserved powers, and will, in the future, take extreme pains so to word international agreements as to render impossible an inter-

pretation by the other signatory parties which will give to them this effect. This caution the recent Japanese school question in California will suggest. But in any case, the Supreme Court will be exceedingly loth to deny legal validity to a treaty provision. For it does not need to be observed that, though by holding a treaty provision unconstitutional that provision is denied legal validity in this country, the United States is not thereby released from its obligation under it to the other signatory powers, and the result is, necessarily, a breach of our covenant with those powers. The same of course would be true should Congress refuse to pass the legislation necessary for putting a treaty into full force and effect, unless, indeed, as is sometimes done, it were provided in the treaty itself that it was not to go into effect unless, and until, the necessary legislative assistance was obtained.

In closing this paper may it be said that it has not been the purpose of the speaker to state the doctrine which in his judgment should guide the Supreme Court were it to approach the subject as an entirely new proposition. Rather the aim has been to point out the position which, as judged by its previous decisions, that tribunal may confidently be expected to take in the future. As Spinoza says in his *Tractatus-Politicus*, "I have labored carefully not to mock, lament, or execrate, but to understand."

The CHAIRMAN. The last address will be by Arthur K. Kuhn, of the New York Bar.

ADDRESS OF ARTHUR K. KUHN, ESQ.,
OF NEW YORK, N. Y.

Mr. President and Gentlemen: I will be very brief in my remarks. It almost seems presumptuous on my part, after the entire subject has been so ably covered by those who have already spoken, to add anything at all; but I desire to address myself to one single point which seems to me to be the crux of the whole matter.

I am of that number who believe that *all* of the treaty-making power which was vested in the people (or in the States, if you

prefer) at the time of the adoption of the Constitution was delegated to the Federal treaty-making organs — President and Senate — and that no residue of sovereignty was reserved in the States.

It does not follow from this, however, that the exercise of the power must of necessity be unlimited, but simply that the power is not limitable by anything that the *States* may do to impair rights or privileges of aliens granted by treaty.

Our President, in his lucid address this morning, intimated that a colorable exercise of the treaty power could not stand, while the opponents of the general view which he takes ask where are you going to draw the line? who is to be the judge of what is real and what is colorable? The point I urge is that as between the States and the treaty-making organs the latter must be the sole judges of what is proper. The protection to the nation (which I admit might prove insufficient in an extreme case) lies in political checks alone. That was precisely the situation as it existed in Great Britain at the time of the adoption of the Constitution and which the delegates to the Constitutional Convention must have contemplated when they vested all of the power to make treaties in the President and the Senate.

The inglorious — I had almost said “perfidious” — sale of Dunkirk to the French effected by Lord Clarendon in the seventeenth century resulted in his impeachment. The same result was reached in respect to Lord Danby for his connection with the treaty between Charles II and Louis XIV by which the allies of Great Britain, the Dutch, were deserted for a pecuniary consideration. The *validity* of the treaties was never called in question. In other words, though the treaty organs acted *ultra vires* and had no *right* so to act, yet they had the *power* so to act, and the nation held itself bound by the action of its agents.

So with us. When the President and Senate regularly pass a treaty with a foreign nation, our faith and credit have been irrevocably pledged, and if the treaty was internationally a proper subject of treaty making between nations the United States, over against its cocontractor, is bound. *Qui facit per alium facit per se*.

My point, therefore, is that so far as foreign nations are con-

cerned the limitation is institutional and not constitutional in the narrower sense. I believe it was this which Hamilton had in mind in one of his letters to the first President of the United States when he said (Works, Vol. VII, p. 118):

There are no express limits to the treaty-making power, and it was a reasonable presumption that it was meant to extend to all treaties usual among nations and so to be commensurate with the variety of exigencies and objects of intercourse which might occur between nation and nation.

The CHAIRMAN. Gentlemen, I do not think we are so wearied but that we can hear a little more. It is possible to make a good point in three minutes, but under the rule I can not allow you more than five minutes. Now, the subject is open for general discussion, under those limitations, for a brief period.

REMARKS BY EVERETT P. WHEELER, ESQ.,
OF NEW YORK CITY.

I should like to add just one point to what has been said. It has been shown, has it not, by the express language of the Constitution, that a treaty is the supreme law of the land. The question has been raised — and it has been raised in Great Britain and in other countries as well as here — how are you going to enforce the treaty without an act of Congress?

It seems to me you do not need an act of Congress to enforce a treaty. A treaty is law. It is the duty of the President to enforce that law, as much as he is required by his oath to enforce any other law.

Then, if the matter is subject to become a suit at law the courts should enforce it. It needs, in short, no act of Congress to give validity and efficacy to rights granted by treaties. The only hiatus in the argument is with reference to criminal infractions of treaties, and inasmuch as our courts have always held there is no common law of the United States with reference to criminal offenses, I think it must be conceded that an act of Congress would be necessary in order to make a violation of a treaty by a criminal act an indictable offense in the courts of the United States.

In connection with the British treaty of 1794, Fisher Ames, in his great argument on that treaty which he made in the House of Representatives in 1795, demonstrated that it was the duty of the House of Representatives, as well as of the Senate, to pass any act that might be necessary to carry it out. It was argued there that Congress was not bound to make the appropriation called for by that treaty, and Fisher Ames convinced the House of Representatives that it was the duty of the House to do it, and they did it.

I submit, with great confidence, in view of the express language of the Constitution, that in cases where the violation of the treaty may be a criminal act, Congress ought to provide by statute for indictment and punishment by Federal courts, and then you have the gap filled, and you enable this Government to discharge its obligation to foreign nations. Unless you do that you are not fully entitled to become a member of the international brotherhood.

The CHAIRMAN. Mr. Wheeler will remember the case of one treaty, at least, of the United States which was ratified by the Senate and proclaimed by the President, but which never went into operation because Congress would not legislate upon the subject.

Mr. WHEELER. I remember it with shame.

The CHAIRMAN. That was the reciprocity treaty with Mexico.

Is there any further comment? The States' rights people have not been heard very much to-night.

The Secretary desires me to remind you again that tickets for the banquet can be had at the library as you go out.

I also have the pleasure of announcing that the meeting to-morrow morning at 10 o'clock will be presided over by the Secretary of Commerce and Labor, Oscar S. Straus, one of our Vice-Presidents.

The morning meeting will conclude the presentation of papers for public discussion. There is to be a reception by the President at 2 o'clock.

The Secretary informs me that tickets for the President's reception can be obtained in the library.

The meeting will stand adjourned until 10 o'clock to-morrow morning.